Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

◆

SOUTHERN COMPANY SERVICES, INC.,
Petitioner,
v.

SUE PRITCHARD,
Respondent.

◆

Petitioner For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

◆

PETITION FOR WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED FOR REVIEW

1. What evidence does a plaintiff have to present in order to establish that a genuine issue of material fact exists as to whether the plaintiff has an impairment that substantially limits a major life activity, and is therefore disabled under the Americans with Disabilities Act?

2. Does the mere use of a mitigating measure such as medication automatically prove the presence of an impairment that substantially limits a major life activity?

3. Does an employer's placement of an employee on disability leave alone constitute evidence that the employee has a record of an impairment that substantially limits a major life activity, or that the employer regarded the employee as having an impairment that substantially limits a major life activity?

4. Is an employer's acquiescence to an employee's assertion that she cannot perform the duties of her job and the restrictions placed on the employee by her doctor constitute evidence that the employer regarded the employee as having a substantial limitation on a major life activity?

5. Does remand despite a developed record containing alternative grounds for affirming summary judgment emasculate Federal Rules of Civil Procedure Rule 56's function?

LIST OF PARTIES

The parties to the proceedings below were Petitioner Southern Company Services, Inc., Defendant Don Welliver, Defendant Jeff Prince, and Plaintiff Sue Pritchard.

RULE 29.6 DISCLOSURE

Petitioner Southern Company Services, Inc.'s parent company is The Southern Company and it has no non-wholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Eleventh Circuit decided on August 28, 1996. The Petition for Rehearing and Suggestion of Rehearing *En Banc* was denied on December 13, 1996.

CITATIONS OF OPINIONS OF THE COURTS BELOW

The United States District Court for the Northern District of Alabama's unreported opinion granting Petitioner Southern Company Services, Inc., Don Welliver, and Jeff Prince summary judgment on all the plaintiff's claims may be found at *Sue Pritchard v. Southern Company Services, Inc.*, 1995 U.S. Dist. LEXIS 6020 (N.D. Ala. Mar. 31, 1995). It is also reprinted in the Appendix to this petition at App. 14. The Eleventh Circuit's opinion reversing the District Court's grant of summary judgment as to Pritchard's Americans with Disabilities Act ("ADA") and the Rehabilitation Act of 1973 claims, affirming summary judgment as to the plaintiff's Title VII claim, and remanding the case for further proceedings is reported at *Pritchard v. Southern Company Services*, 92 F.3d 1130 (11th Cir. 1996). It is also reprinted in the Appendix to this petition at App. 1. The Eleventh Circuit's denial of Southern Company Services, Inc.'s Petition for Rehearing and Suggestion of Rehearing *En Banc* and modification of its prior opinion is reported at *Pritchard v. Southern Company Services*, 102 F.3d 1118 (11th Cir. 1996). It is also reprinted in the Appendix to this petition at App. 46.

GROUNDS OF JURISDICTION

On August 28, 1996, the Eleventh Circuit reversed the District Court's grant of summary judgment to Petitioner Southern Company Services, Inc. with respect to the plaintiff's claims under the ADA and the Rehabilitation Act. The Eleventh Circuit denied Petitioner's Petition for Rehearing and Suggestion of Rehearing *En Banc* on December 13, 1996.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Section 102(2) of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(2), provides as follows:

> (2) Disability
>
> The term "disability" means, with respect to an individual –
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

Section 706(8)(B) of the Rehabilitation Act, 29 U.S.C. § 706(8)(B), provides as follows:

> (B) Subject to subparagraphs (C), (D), (E), and (F), the term "individual with a disability" means, for purposes of sections 701, 713, 714 of this title, and subchapters II, IV, V, and VII of this subchapter, and person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

STATEMENT OF THE CASE

Proceedings Below

After her termination from employment, Sue Pritchard brought claims under Title I of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 et seq., section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. against her former employer Southern Company Services, Inc. ("SCSI") and two of her former supervisors, Don Welliver and Jeff Prince. In its March 31, 1995 Order, the United States District Court for the Northern District of Alabama granted summary judgment in favor of SCSI, Don Welliver and Jeff Prince on all of Pritchard's claims. (App. 14-45). In regard to Pritchard's ADA and Rehabilitation Act claims, the District Court first found that Pritchard offered no evidence that her impairment substantially limited a major life activity other than working at the time of her termination, and that her own contentions respecting what she could do foreclosed such a limitation:

> The record before the court demonstrates that the major life activities specifically identified by the plaintiff – function, sleep, concentrate and communicate – were not substantially limited at the time her employment was terminated nor for approximately six months prior to that time. For example, plaintiff ardently claims that she was qualified for numerous positions at SCSI that did not require work with nuclear power. . . .
>
> The plaintiff does not specifically indicate how the major life activities of concentration and communication were substantially limited by her depression. However, if the plaintiff was, as she has asserted, qualified for numerous positions all of which required the plaintiff to possess the ability to effectively communicate, orally and written, and concentrate, it does not follow that the plaintiff was simultaneously limited in those same areas.
>
> Likewise, the plaintiff has presented no evidence that her ability to sleep or "function" [footnote omitted] was substantially limited at the time she was terminated. (App. 28-30).

The District Court further found that Pritchard had offered no evidence that at the relevant time, she was substantially limited in her major life activity of working:

> While these statistics might be interesting, they do not demonstrate that the plaintiff's impairment has disqualified her from a class of jobs or a broad range of jobs in various classes as required by the

> ADA. The mere fact that the plaintiff's condition disqualified her for approximately 8,300 jobs, without more, says nothing about the existence of engineering jobs that do not expose a worker to nuclear energy. (App. 31-32).

The District Court further found that Pritchard did not offer any evidence that she was regarded as disabled:

> [T]he record suggests that the defendant regarded the plaintiff as capable of performing her job despite her impairments. . . .
>
> The plaintiff has presented no evidence that the defendant terminated her employment based on a "myth, fear or stereotype" surrounding her depression or perception thereof. Rather, the defendant contends, and the record reflects, that the plaintiff's employment was terminated since she did not possess the flexibility to accept nuclear related assignments. (App. 34).

Pritchard appealed the District Court's grant of summary judgment to the United States Court of Appeals for the Eleventh Circuit. On August 28, 1996, the Eleventh Circuit reversed the District Court's grant of summary judgment with respect to Pritchard's ADA and the Rehabilitation Act claims against SCSI, affirmed summary judgment as to the plaintiff's Title VII claim against SCSI, and remanded the case for further proceedings. (App. 1-13). With respect to Pritchard's ADA and Rehabilitation Act claims, the Eleventh Circuit found evidence of a substantial limitation of a major life activity in Pritchard's affidavit and implied that Pritchard's use of medication created a genuine issue of material fact as to whether her symptoms substantially limited a major life activity:

> Pritchard stated in an affidavit that she suffers from depression and dysautonomia, that she continues to have such conditions, and that they substantially limited her ability to function at the time of her termination. Her symptoms included profound fatigue, difficulty sleeping and communicating, difficulty concentrating, and experiencing

> suicidal thoughts. In her deposition in June of 1994, Pritchard stated that she was still taking medication for her conditions.
>
> Dr. Samuel Saxon stated in an affidavit that Pritchard's symptoms included marked fatigue, lack of energy, lack of interest, poor concentration, memory problems, suicidal thoughts, depressed affect, and irritability. Work in the nuclear field exacerbated her stress and thus her symptoms. In his opinion, Pritchard was able to return to work outside the nuclear field in January of 1993, but she was still experiencing physical and mental symptoms.
>
> It is true that these statements may be read to conflict with Pritchard's contention that she was able to return to work in January of 1993. However, taking the evidence in the light most favorable to Pritchard, it is possible that both are true: she still suffered from these symptoms and they limited major life activities, but she was able to control them sufficiently with the help of medication to perform at work in the non-nuclear field. [footnote omitted]. We think this evidence presents a case for a jury to determine whether she suffered from those symptoms when she was terminated, and whether those symptoms substantially limited a major life activity. (App. 8-9).

Further, the Eleventh Circuit held that the mere fact that Pritchard was placed on paid disability leave through November of 1992, and then on unpaid disability leave alone constituted evidence that Pritchard had a record of being impaired and that SCSI regarded her as being impaired sufficient to create a genuine issue of material fact:

> Pritchard was placed on paid disability leave through November of 1992, and then on unpaid disability leave. This constitutes evidence that Pritchard had a record of being impaired and that SCSI regarded her as being impaired. Again, this evidence creates genuine issues of material fact as to

whether Pritchard was disabled under the ADA. (App. 9).

The Eleventh Circuit further erred by remanding the case for the District Court to determine whether Pritchard had met the other elements of her ADA and Rehabilitation Act claims despite the fact that the record supported an affirmance on the basis that the other elements were not met:

> Of course, in order to prevail, Pritchard must not only show that she has a disability, but also that she was discriminated against because of her disability and that she was a qualified individual. *See 42 U.S.C. § 12132*. The District Court did not rule on these elements in its summary judgment order. We leave the issues open on remand. (App. 9-10).

Petitioner SCSI timely filed a Petition for Rehearing and Suggestion of Rehearing *En Banc* to the Eleventh Circuit. On December 13, 1996, the Eleventh Circuit denied the Petition for Rehearing and Suggestion of Rehearing *En Banc* and modified its previous opinion by affirming summary judgment for Don Welliver and Jeff Prince on all claims. (App. 46-47).

Facts Material to Questions Presented

Petitioner SCSI is a service company created under the Public Utility Holding Company Act of 1935 to provide engineering services to operating companies generating electricity. SCSI services principally the Southern Nuclear Operating Company, Inc., whose business is operating nuclear plants. R2-37-1.[1] Having previously held technical and co-op positions at SCSI, Pritchard, after obtaining her degree, was hired by SCSI as an electrical engineer in SCSI's Engineering Organization in January, 1986. R3-46-Ex.5-34. In July, 1990, Pritchard was diagnosed as having depression, resulting in increased stress with regard to work in areas involving nuclear energy. At least in part because of her concerns with performing nuclear design work, Pritchard requested and received a transfer to the Quality Assurance Department, also within the Engineering Organization. In the Quality Assurance Department, Pritchard was charged with reviewing what she had previously designed. She audited nuclear power generating plant support engineering projects for compliance with applicable regulatory standards and audits of non-nuclear projects for compliance with SCSI's Engineering Basic Quality Program.

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[1] Citations to the record as certified to the Eleventh Circuit are provided.

Pritchard continued to be anxious with respect to electrical engineering work involving nuclear facilities, and in March or April, 1992, she tendered her resignation to her immediate supervisor, Robert Conry. She indicated to him that her decision was related to her anxiety regarding nuclear power work. Pleased with her level of performance, Conry declined to accept her resignation and suggested instead that she seek assistance through SCSI's Employee Assistance Program ("EAP").[2] Pritchard contacted SCSI's EAP and was referred to Mary Trimm with Montclair Counseling Center, who recommended that Pritchard be given approximately one month off work. In response, SCSI placed Pritchard on a paid disability leave from May 1, 1992, which was extended through November 12, 1992. On November 13, 1992, her paid leave of absence period expired, and SCSI placed her on an unpaid medical leave of absence.

In December, 1992, at the Quality Assurance Department Christmas luncheon, Pritchard told Conry that she was prepared to return to work in a capacity that did not involve any work related to work in the nuclear field. In January, 1993, Pritchard was released to return to any work except that she said her doctor instructed her to avoid "nuclear work." To clarify, SCSI sent a detailed description of her job to Dr. Neville with the release previously provided and a request to provide SCSI with specific restrictions. R3-46-Ex.5-203, DX

---

[2] At no time did SCSI ever suggest that Pritchard could not perform her job at an acceptable level; rather, that suggestion would come from Pritchard and her doctor.

24, R2-35-4-Att.D. Dr. Neville's February 9, 1993 letter did not provide any specific restrictions; instead, it stated that she "should not" do work in the "nuclear field." R3-46-Ex.5-DX25. Dr. Neville never explained what he meant by work in the "nuclear field." With respect to non-nuclear work, Dr. Neville said that Pritchard's condition had improved to the extent that he expected her to perform "essentially up to her usual level of excellence." R3-46-Ex.5-DX25. After reviewing Dr. Neville's February 9, 1993 letter, Conry and Don Welliver agreed that "nuclear field" was ambiguous because Pritchard did no "nuclear engineering" (she was not a nuclear engineer), and the electrical engineering she did inevitably would involve nuclear plants. R2-37-7; R3-46-Ex.6-123-24. Dr. Saxon, who offered nothing indicating that he ever saw Pritchard after July 20, 1992, stated in an affidavit that he agreed with Dr. Neville's conclusion that Pritchard could work as of January, 1993.

All engineers in the Quality Assurance Department within the Engineering Organization were required to perform audits on nuclear projects. R3-46-Ex.6-237; R2-37-1, 3. It was an essential function of their jobs. Engineering Organization employees, including engineers, designers, and technical writers, had been terminated or required to resign for refusing such assignments. R2-37-5; R2-34-2-3. Further, Pritchard's position in Quality Assurance did not call for enough audits on non-nuclear facilities to permit the creation of a new position, even if creation of a new position were required. These audits were performed by teams, and all employees in the department would be deprived of the experience of this type of work if the small amount of non-nuclear audits were assigned to one person. R3-46-Ex.6-302, 308-10, 316-22.

On January 29, 1993, Jeff Prince informed Pritchard that flexibility to accept nuclear related assignments was required of all engineers within SCSI's Engineering Organization. Pritchard explained that she could not perform nuclear related work but would be interested in a position that would not require such flexibility. Prince suggested that she call the JobLine and review postings to determine what jobs were posted. Prince informed her that if she could not return to her current position in Quality Assurance, "it would be [her] responsibility to apply for employment elsewhere at SCS[I] **if [she] wished to continue there**." R3-46-Ex.5-220 (emphasis added). Although the JobLine number would give her a list of openings, and although her husband even brought home postings for her with instructions on them, Pritchard never applied for any position. R3-46-Ex.10-62-65; R3-46-Ex.5-219-20, 248, 271.

After receiving Dr. Neville's February 9, 1993 letter, Price informed Pritchard through a letter dated February 15, 1993 that her Disability Leave of Absence was continued until May 15, 1993, but any additional continuances would require a certification of disability from her treating physician. Prince further requested that Pritchard provide a more definite statement of disability prior to May 15, 1993. R3-46-Ex.5-DX25. In May, 1993, Prince informed Pritchard that she had not provided SCSI with a more definite statement regarding her claimed disability as she had been requested to do and requested that she submit such a certification by May 28, 1993 to avoid termination. R3-61-Ex.5-225. By letter dated May 25, 1993, at Pritchard's request, Dr. Neville wrote SCSI a second letter merely repeating his prior evaluation that she was able to return to work but recommended that she not work in the nuclear field. When SCSI followed up this letter with a telephone call, Neville refused to give them any information and stated, at Pritchard's request, that he would only respond in writing to written questions. R2-35-6; R2-37-10; R3-46-Ex.5-226, 346-47, DX 33. SCSI decided not to submit any more written inquiries because of SCSI's prior experience with written inquiries. R3-46-Ex.6-228.

No one at SCSI regarded Pritchard as having a disability. *See, e.g.* R3-46-Ex.7-42-52. As indicated above, she was placed on paid and unpaid disability leave in response to the recommendation of her health care provider through SCSI's EAP program. SCSI did not act based on myths, fears or stereotypes. SCSI did, however, know that what she and her doctor said that she could not do – "work in the nuclear field" – was what all Engineering Department employees must be able to do.

On June 18, 1993, Don Welliver informed Pritchard that she was terminated. She was terminated because (1) she declined to perform any work related to nuclear plants because her psychiatrist determined that she no longer could perform work in the "nuclear field", (2) the Engineering Organization required the flexibility to perform such work of all its employees, (3) she did not take advantage of the six months of leave following her release to apply as required when seeking a position outside the Engineering Organization, and (4) there was no prospect of (1)-(3) ever changing. R2-37-10; R3-46-Ex.5-34, 42, 56-58, 163-65, 167, 276-77, 282.

Basis for Federal Jurisdiction

The basis for federal jurisdiction in the court of first instance is 28 U.S.C. § 1331, granting district court's original jurisdiction of all civil actions arising under the laws of the United States.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT CONTRADICTS THIS COURT AND OTHER CIRCUITS IN FINDING "DISABILITY" WITHOUT ANY ACTUAL, RECORDED, OR PERCEIVED *SUBSTANTIAL* LIMITATION OF A MAJOR LIFE ACTIVITY.

The Eleventh Circuit's reliance upon symptoms without evidence of severity to establish a genuine issue of fact concerning the existence of an actual disability, and its reliance upon the fact of disability leave to establish a genuine issue concerning the existence of a recorded disability, contradicts decisions of the Fifth, Seventh, Ninth and Tenth Circuits. ADA Title I's protection from disability-based discrimination extends only to a "qualified individual with a disability." *See* 42 U.S.C. § 12112(a). To be an "individual with a disability", the first step in establishing entitlement to protection as a "qualified individual with a disability", an ADA Title I plaintiff must show that he or she has a physical or mental impairment that substantially limits a major life activity, or has a record of having had a physical or mental impairment that substantially limits a major life activity, is regarded as having a physical or mental impairment that substantially limits a major life activity. 42 U.S.C. § 12102. The Eleventh Circuit found a genuine issue of material fact about whether Pritchard was an individual with a disability without any evidence that any alleged restrictions from Pritchard's alleged impairment substantially limited any major life activity, had imposed such a limitation in the past, or was regarded as having imposed such a limitation. The Eleventh Circuit view contradicts the statute, the EEOC regulations, and common sense.

The Eleventh Circuit found that Pritchard actually had a physical or mental impairment that substantially limited a major life activity because she claimed to have symptoms of undisclosed severity. The Eleventh Circuit observed that she raised an issue concerning the existence of a substantial limitation because she said that "she continues to have such conditions, and that they substantially limited her ability to function at the time of her termination" in that she had "profound fatigue, difficulty sleeping and communicating, difficulty concentrating, and experiencing suicidal thoughts." The Eleventh Circuit also noted that a psychologist, who last treated her a year prior to her termination and who believed that she could do anything but electrical engineering work on nuclear plants, stated that she had complained of "marked fatigue, lack of interest, poor concentration, memory problems, suicidal thoughts, depressed affect, and irritability." The Eleventh Circuit never bothered to identify what major life activity was affected; Pritchard never provided evidence under the EEOC factors definition "substantial" in terms of the duration, severity, and long-term impact on Pritchard's ability to perform any major life activity when compared to the average person. The decision found that Pritchard was an "individual with a disability" based on a current impairment without any substantial limitation of a major life activity. This bizarre rationale contradicts not only the express statutory language and EEOC regulations, but also the clear precedent of more conventional statutory constructions of other circuits.

First, most decisions decline to find a genuine issue respecting the **substantial** nature of a major life activity limitation without more than a conclusory assertion by the plaintiff.[3] Second, most decisions identify a true major life activity that is substantially limited. The Eleventh Circuit did not here. The EEOC specifically lists "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working", 29 C.F.R. § 1630.2(i); other circuits do not recognize a substantial limitation without identifying precisely what major life activity is limited, and no other circuit recognizes the so-called ability to "function" in this category.[4] Third, even if the ability to "function" were a major life activity, other circuits do not simply presume that any impairment affecting it establishes a substantial limitation; every other circuit requires evidence that an impairment causes a limitation that is "**substantial**" in light of the 29 C.F.R. § 1630.2(j) factors respecting its duration, severity, and permanent or longterm impact when the impaired person's ability to "function" is compared with the average person's ability to "function".[5] Indeed, Pritchard's sworn testimony that she is capable of performing numerous jobs with functions requiring concentration, communication, and at least average energy forecloses any possibility that any such limitation could have been substantial. *See Ouzts v. USAIR, Inc.*, 8 Nat. Dis. Lab. Rptr. ¶ 267 p. 1049 (W.D. Pa. 1996) (court focused on testimony concerning daily activities to determine that limitation caused by pain was not "substantial").

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[3] *See Beasley v. Indiana Bell Tel Co.*, 1996 U.S. App. LEXIS 4956 (7th Cir. Mar. 6, 1996) (court refused to find disability based upon similar evidence from plaintiff and doctor); *Bradley v. Harcourt Brace and Co.*, 104 F.3d 267, 271 (9th Cir. 1996) (plaintiff alone); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996) (employee deposition testimony disputing medical evidence did not present "a sufficient disagreement to require submission to a jury."); *Ray v. Glidden Co.*, 85 F.3d 227, 229 (5th Cir. 1996) (plaintiff and doctor).

[4] *E.g.*, *Soileau v. Guilford of Maine*, 8 Nat. Dis. Lab. Rptr. ¶ 138 p. 562 (D. Me. June 10, 1996) (conclusory claim that depression limited daily activities and interaction with people did not raise a genuine issue; "the fact that Soileau's disorder has caused him to alter his lifestyle does not bring him under the umbrella of the ADA's major life activity requirement."); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677 (10th Cir. 1996) (affirming summary judgment against Title I claim, court refused to treat reproduction or "caring for others" as major life activities).

Finally, the Eleventh Circuit's presumption of a disability merely because Pritchard continues to take medication contradicts the Eleventh Circuit's own decision in *Harris v. H&W Contracting Co.*, 102 F.3d 516, 521 (11th Cir. 1996), as well as those of the Seventh Circuit, *Roth v. Lutheran General Hospital*, 57 F.3d 1446, 1454 (7th Cir. 1995) ("the mere use of a mitigating measure does not automatically prove the presence of a disability"); and the Eleventh Circuit's insistence on pretending that medication is not there when judging if a limitation is "substantial" contradicts the decisions of the Fifth and Seventh Circuits. *Compare Harris v. H&W Contracting Co.*, 102 F.3d 516 (11th Cir. 1996) (impairment's impact is judged after subtracting the effects of medication), *Pritchard v. Southern Company Services, Inc.*, 92 F.3d 1130 (11th Cir. 1996) (same) *with Roth v. Lutheran General Hospital*, 57 F.3d

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[5] *See Kelly v. Drexel University*, 94 F.3d 102, 105-06 (3d Cir. 1996) (limitation that prevented jogging and confined walking to one mile did not even raise a genuine issue of fact concerning whether it was a substantial limitation); *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1995) (affirming summary judgment when plaintiff "failed to present sufficient evidence to establish the nature, duration, and long-term impact of his medical problems caused him to be substantially limited in a major life activity."); *Williams v. Channel Master Satellite Systems, Inc.*, 101 F.3d 346, 349 (4th Cir. 1996) (25 pound lifting limitation not substantial under factors); *Robinson v. Global Marine Drilling Co.*, 101 F.3d 35, 37 (5th Cir. 1996) (50% of normal lung capacity and trouble climbing stairs not "substantial"), *cert. filed* Feb. 20, 1997; *Roth v. Lutheran General Hospital*, 57 F.3d 1446, 1453 (7th Cir. 1995) ("not every impairment that affected an individual's major life activities is a substantial impairment.").

1446, 1454 (7th Cir. 1995) ("the mere use of a mitigating measure does not automatically prove the presence of a disability"); *Chandler v. Dallas*, 2 F.3d 1385, 1395 (5th Cir. 1993) (diabetes was not disability just because employee would go into coma without insulin), *cert. denied*, 128 L.Ed.2d 61 (1994). Although no rational measure of the "substantial limitation" requirement would find a substantial limitation here even without medication, this conflict alone at the very heart of the ADA – the determination of who gets protection – cries out for this Court's guidance.

The Eleventh Circuit's alternative grounds for finding a disability are equally contrary to other circuits. The Eleventh Circuit contends that formerly **being on leave** "constitutes evidence that Pritchard has a record of being impaired and that SCSI regarded her as being impaired." As discussed below, other Circuits disagree. Moreover, every other circuit to address the issue has found that an employer does not regard an individual as substantially limited by reason of a physical or mental impairment just because the employer places someone on disability leave for a temporary period, *see Gray v. Ameritech Corp.*, 937 F. Supp. 762, 770 (N.D. Ill. 1996), especially, when the employer acts in accordance with the employee's health care provider's instructions. *See Ouzts v. USAIR, Inc.*, 8 Nat. Dis. Lab. Rptr. ¶ 267 p. 1052 (W.D. Pa. 1996). SCSI placed Pritchard on leave at the behest of her counselor, Trimm, and did not return her to electrical engineering work involving nuclear plants because of the cryptic instruction of her psychiatrist. Her unwillingness to provide additional information cannot create a perception of substantial limitation where none exists. *See Schluter v. Industrial Coils, Inc.*, 8 Nat. Dis. Lab. Rptr. ¶ 197 (W.D. Wis. 1996). Nor could Pritchard claim in any other circuit that she is regarded as substantially limited because SCSI regarded her as unable to perform electrical engineering work on a nuclear plant. In every other circuit, regarding an individual as unable to do all or a part of one job is not regarding her as substantially limited. *See, supra* note 12.

The requirement that an ADA plaintiff establish that he or she has an actual, recorded, or perceived substantial limitation to a major life activity by reason of an actual, recorded, or perceived impairment is not a technicality; it is the defining provision of the scope of this new law's protection. This provision needs this Court's guidance; this case offers the best vehicle.

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS THAT REQUIRE OBJECTIVE MEDICAL EVIDENCE OF A SUBSTANTIAL LIMITATION ON A MAJOR LIFE ACTIVITY IN ORDER TO PROVE A DISABILITY AND AVOID SUMMARY JUDGMENT.

Finding "a genuine issue of material fact as to whether Pritchard suffered other symptoms when she was terminated and as to whether those symptoms substantially limited a major life activity," the Eleventh Circuit erroneously equated **subjective** evidence of an impairment with **objective** evidence of a **substantial** limitation on a major life activity.[6] Choosing not to judge the degree of limitation, the Eleventh Circuit found a genuine issue concerning a substantial limitation because Pritchard listed a number of symptoms, offered conclusory affidavit language using the word "substantial" in a sentence, and claimed that "she still suffered from these symptoms and they **limited** major life activities." That is **not** enough. Pritchard offered no case-specific evidence that either her dysautonomia or her depression **substantially limited** any major life activity other than working at the time of her termination.[7] The mere existence of a physical or mental impairment is insufficient to support an inference that it imposed a substantial limitation on one or more major life activities. " 'Many impairments do not impact an individual's life to the degree that they constitute disabling impairments.' " *Hamm v. Runyon*, 51 F.3d 721, 726 (7th Cir. 1995) (quoting 29 C.F.R. pt. 1630 App., § 1630.2(j)). *See Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995) ("A physical impairment, standing alone, is not necessarily a disability as contemplated by the ADA. The statute requires an impairment that substantially limits one or more of the major life activities.").[8] Pritchard offered no evidence that the alleged impairment was permanent; the temporary conditions she listed are not covered.[9]

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[6] The Eleventh Circuit did not ascertain under the EEOC factors whether the limitation was substantial. To determine if an impairment substantially limits, the court considers: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long term impact, or expected permanent or long term impact of, or resulting from, the impairment. 29 C.F.R. § 1630.2(j)(2).

[7] *See Treadwell v. Alexander*, 707 F.2d 473, 475 (11th Cir. 1983); *McDaniel v. Mississippi Baptist Medical Center*, 877 F. Supp. 321 (S.D. Miss.), *aff'd without op.*, 74 F.3d 1238 (5th Cir. 1995).

In not requiring Pritchard to present **objective evidence** of a **substantially limiting** impairment, as opposed to evidence of an impairment plus her own conclusory subjective mantra, the Eleventh Circuit's decision conflicts with decisions of other Circuits:

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[8] *See Vaughan v. Harvard Indust., Inc.*, 8 Nat. Dis. Lab. Rptr. ¶ 236 p. 934 (W.D. Tenn. 1996) (some restriction is insufficient and physical impairment alone is not a disability); *Thompson v. American Hosp. Assoc.*, 8 Nat. Dis. Lab. Rptr. ¶ 365 p. 1421 (N.D. Ill. 1996) (same); *Soileau v. Guilford of Maine, Inc.*, 8 Nat. Dis. Lab. Rptr. ¶ 136 pp. 562-64 (D. Ma. 1996) (physiological disorder of dysthymia did not substantially interfere with employee's major life activities); *Freund v. Lockheed Missiles and Space Co.*, 8 Nat. Dis. Lab. Rptr. ¶ 198 p. 788 (S.D. Ga. 1996) ("A mere degradation of a major life activity, however, does not amount to a disability under the ADA.").

[9] *See* 29 C.F.R. Part 1630 App., § 1630.2(j); *Sanders v. Arneson Products, Inc.*, 91 F.3d 1351, 1354 (9th Cir. 1996) (employee's temporary psychological impairment that lasted less than four months did not constitute a disability); *McDonald v. Pennsylvania Dept. of Public Welfare*, 1995 U.S. App. LEXIS 20655 (3rd Cir. Aug. 4, 1995) ("The Rehabilitation Act and the Disabilities Act do not apply to the transient, nonpermanent condition that she experienced. . . . ").

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Pritchard stated in an affidavit that she suffers from depression and dysautonomia, that she continues to have such conditions, and that they substantially limited her ability to function at the time of her termination. Her symptoms included profound fatigue, difficulty sleeping and communicating, difficulty concentrating, and experiencing suicidal thoughts. In her deposition in June of 1994, Pritchard stated that she was still taking medication for her conditions.

. . . We think this evidence presents a case for a jury to determine whether she suffered from those symptoms when she was terminated, and whether those symptoms substantially limited a major life activity. (App. 8-9).

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Because Beasley could procure **no objective medical evidence**, the district court had to base its decision whether Beasley had established his production burden on the veracity of Beasley's subjective complaints. This decision would be a credibility assessment of Beasley's and Dr. d'Amrosio's statements and would be inappropriate for summary judgment. However, the district court assumed that Beasley's physical impairment qualified under the ADA but found he was not disabled under the ADA because he submitted no evidence that his symptoms, even when acute, substantially limited a major life activity. Beasley **presented no evidence of shortness of breath, hypotension, or other symptoms indicating the substantial limitation of a major life activity**. See *Roth v. Lutheran General Hospital*, 57 F.3d 1446, 1454 (7th Cir. 1995). Thus, the district court appropriately granted summary judgment.

Beasley v. Indiana Bell Telephone Co., 1996 U.S. App. LEXIS 4956 *11 (7th Cir. Feb. 28, 1996) (emphasis added).

See Roth v. Lutheran General Hosp., 57 F.3d 1446, 1455 (7th Cir. 1995) ("More importantly, no **objective medical findings** directly support Dr. Roth's assertion that he is so significantly restricted by his visual impairment such that he is incapable of performing night calls.").

Similarly, the Fifth Circuit requires more than just a plaintiff's subjective statement that he or she is impaired in order to avoid summary judgment. In *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995), the Fifth Circuit held that the plaintiff's contentions in her deposition that "she has difficulty picking up little things from the floor . . . and holding things up high or real tight for long periods of time . . . turning the car's ignition" along with testimony from her medical expert that her arm was **impaired** was insufficient to establish a **substantial limitation** on a major life activity other than working. *Id.* at 726 n.11. The Fifth Circuit noted that "[m]ore relevant to today's inquiry is that there was no evidence offered on which a jury could find that this impairment substantially limited a major life activity." *Id.* at 726. *See Chandler v. City of Dallas*, 2 F.3d 1385, 1391 (5th Cir. 1993) (the "substantial limitation" determination must not be simply presumed from the name of a condition or the existence of a symptom."), *cert. denied*, 128 L.Ed.2d 61 (1994). Therefore, according to other Circuits, raising a "substantially limited" issue requires more than just using "substantially limited" in an affidavit sentence. *See Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996) (employee's deposition testimony disputing medical evidence does not present " 'a sufficient disagreement to require submission to a jury.' ").

III. CIRCUITS CONFLICT CONCERNING WHETHER MITIGATING MEASURES SUCH AS MEDICATION AUTOMATICALLY PROVES THE EXISTENCE OF AN IMPAIRMENT THAT SUBSTANTIALLY LIMITS A MAJOR LIFE ACTIVITY.

The Eleventh Circuit's decision indicating that Pritchard's use of medication created a genuine issue of material fact as to whether her alleged symptoms substantially limited a major life activity conflicts with the decision of the Seventh Circuit's decision in *Roth v. Lutheran General Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995), where the Court stated as follows:

> [T]he mere use of a mitigating measure does not automatically prove the presence of a disability; some individuals may use medication, prosthetic devices, or auxiliary aids to alleviate impairments that are not substantially limiting.

It further contradicts its own decision in *Harris v. H&W Contracting Co.*, 102 F.3d 516, 521 (11th Cir. 1996) (agreeing with *Roth*).

Moreover, the Eleventh Circuit's holding that medication is not to be considered when determining whether a substantial limitation on a major life activity exists conflicts with the Seventh Circuit's decision in *Roth* and the Fifth Circuit's decision in *Chandler v. City of Dallas*, 2 F.3d 1385, 1391 (5th Cir. 1993), *cert. denied*, 128 L.Ed.2d 61 (1994), where the Court held that a city employee failed to establish that his insulin dependent diabetes substantially limited a major life activity.

IV. THE ELEVENTH CIRCUIT'S DECISION THAT AN EMPLOYEE'S PLACEMENT ON DISABILITY LEAVE CONSTITUTES EVIDENCE THAT THE EMPLOYEE HAD A RECORD OF BEING IMPAIRED AND WAS REGARDED AS BEING IMPAIRED IS CONTRARY TO THE STATUTE AND DECISIONS OF OTHER CIRCUITS.

A. Leave alone does not establish a record of impairment that substantially limits a major life activity and does not establish that an employee is regarded as having such an impairment.

By treating Pritchard's disability leave alone as sufficient to establish that Pritchard had a "record of such impairment" and was "regarded as having such impairment," the Eleventh Circuit disregarded the plain language of the statute, which requires that a plaintiff must have a record of impairment that **substantially limits** a major life activity and must be regarded as having an impairment that **substantially limits** a major life activity. The Eleventh Circuit has in effect equated disability leave for any reason with a "disability" under the ADA without regard to the definition of a "disability" under 42 U.S.C. § 12102(2).

Other Courts have rejected such a proposition:

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Pritchard was placed on paid disability leave through November of 1992, and then on unpaid disability leave. This constitutes evidence that Pritchard had a record of being impaired and that SCSI regarded her as being impaired. (App. 9).	[Gray's] central argument is that the facts that Ameritech allowed Gray to take "disability leave" and that her medical file referred to her skin condition as a "disability" are evidence that Ameritech treated Gray as if she were substantially limited in major life activities. She also asserts that Scott's belief that Gray's condition was contagious and Scott's insistence that Gray take disability leave are evidence that she was regarded as being disabled. **Insofar as Gray bases her argument on Ameritech's use of the word "disability" in reference to Gray's medical leave and in Gray's records, Gray wrongly assumes that "disability" can be neatly transferred from context to context without regard to how the term is defined.** Contrast, for example, the

> Reg. § 1630.2(g) definition of disability with the Social Security Act's provision (42 U.S.C. § 416(i)), which defines "disability" in an entirely different manner for purposes of disability insurance benefits. **Clearly "disability" as used in ADA is a term of art, and thus the fact that someone at Ameritech may have employed it in a more general sense in Gray's medical records really means nothing.**
>
> *Gray v. Ameritech Corp.*, 937 F. Supp. 762, 770 (N.D. Ill. 1996) (emphasis added).[10]

Applying the term "disabled" to someone in one context does not constitute a "disability" under the ADA. Consider The Equal Employment Opportunity Commission Enforcement Guidance: Workers' Compensation and the Americans

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[10] *See Robinson v. Neodata Serv., Inc.*, 94 F.3d 499, 502 (8th Cir. 1996) ("Social Security determinations [of "disability"] . . . are not synonymous with a determination of whether a plaintiff is a "qualified person" for purposes of the ADA."); *Matthews v. TCI of Ill.*, 8 Nat. Dis. Lab. Rptr. ¶ 137 p. 557 (N.D. Ill. 1996) ("[E]ven a designation such as light or medium duty[ ] is not sufficient to establish the existence of a disability."); *Thompson v. City of Arlington, Texas*, 838 F. Supp. 1137, 1152 (N.D. Tex. 1993) ("The mere fact that the City put her on restricted duty . . . does not suggest that the City regards her as having an impairment of the kind contemplated by ADA."); *see also* EEOC Enforcement Guidance on Disability Representations, EEOC Notice 915.002, 1997 DLR 31 d32 (Feb. 14, 1997) ("The ADA definition of 'qualified individual with a disability' differs from the definitions used in the Social Security Act, state workers' compensation laws, disability insurance plans, and other disability benefits programs designed for different purposes.").

With Disabilities Act, EEOC Notice 915.002, 1996 DLR 172 d19 (BNA Sept. 5, 1996):

> 1. Does everyone with an occupational injury have a disability within the meaning of the ADA?
>
> No. Even if an employee with an occupational injury has a "disability" as defined by a workers' compensation statute, s/he may not have a "disability" for ADA purposes. . . .
>
> 2. Does every person who has filed a workers' compensation claim have a disability under the "record of" portion of the ADA definition?
>
> No. A person has a disability under the "record of" portion of the ADA definition only if s/he has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.[11]

The Seventh Circuit in *Byrne v. Board of Education, School of West Allis-West Milwaukee*, 979 F.2d 560 (7th Cir. 1992) held that a school teacher's hospital stay was not sufficient to constitute a "record of impairment" under the Rehabilitation Act. The Seventh Circuit quoted the Sixth Circuit's decision in *Taylor v. United States Postal Service*, 946 F.2d 1214, 1217 (6th Cir. 1991), which interpreted this Court's decision in *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987) as follows:

> Unfortunately, the [*Arline*] court does not provide any details concerning either the length of Arline's hospitalization or the severity of her affliction.

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[11] *See Milatz v. Frito-Lay, Inc.*, 1997 U.S. App. LEXIS 599 at *6 (10th Cir. Jan. 15, 1997) ("Milatz's injury and worker's compensation rating were insufficient to establish disability under subsection (A). . . . "); *Ray v. Glidden Co.*, 85 F.3d 227, 229 (5th Cir. 1996) (doctor's restriction for continuous, heavy lifting did not render employee substantially limited in the major activities of lifting or working); *Sweet v. Electronic Data Systems*, 5 AD Cases (BNA) 853, 859 (S.D.N.Y. 1996) (medical records and workers' compensation papers chronicle an eye injury that does not qualify as a substantially limiting impairment).

> Therefore, unless we read *Arline* as establishing the nonsensical proposition that *any* hospital stay is sufficient to evidence a "record of impairment," which we decline to do, the case offers us little guidance.

Byrne, 979 F.2d at 566. *See Szymanska v. Abbott Laboratories*, 3 AD Cases (BNA) 748, 761 (N.D. Ill. 1994) (employee's "past condition and past hospitalization does not, without more, indicate any impairment that substantially limits and of her major life activities.").

Also, the Seventh Circuit in *Stewart v. County of Brown*, 5 AD Cases (BNA) 1018, 1021 (7th Cir. 1996) held that a sheriff's statement that a deputy sheriff to be emotionally or psychologically imbalanced, the sheriff's conclusion that the deputy sheriff was temperamentally unfit to serve as a sheriff's deputy, the sheriff's ordering of a number of psychological evaluations for the deputy sheriff, and the sheriff's belief that the deputy sheriff was "excitable" did not "amount to a showing even of a perception of a mental impairment that substantially limits one or more of the major life activities set forth in the regulation."

Moreover, Pritchard's disability leave is only evidence that she and her doctor believed that she could not perform the duties of her specific job in Quality Assurance; it is not evidence she was regarded by SCSI as not being able to perform "a class of jobs" or "a broad range of jobs in various classes" and therefore regarded as limited in the major life activity of working. In *Byrne*, the Seventh Circuit held that a teacher's medical leave and transfer did not establish that she was regarded as disabled stating that "[c]ourts have uniformly held that an employer does not necessarily regard an employee as handicapped simply by finding the employee to be incapable of satisfying the singular demands of a particular job." *Byrne*, 979 F.2d at 567 (quoting *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986)). Similarly, the Court in *Ouzts v. USAir, Inc.*, 8 Nat. Dis. Lab. Rptr. ¶ 267 p. 1052 (W.D. Pa. 1996) held:

> Moreover, USAir does not perceive plaintiffs' impairment as substantially limiting the major life activity of working. Although USAir acquiesced in their representations made by plaintiffs and their treating physicians regarding their ability to work as reservations sales agents by allowing them to take as much time off from work as needed and by offering plaintiffs the option of working part-time in this position, . . . an employer does not "regard an employee as disabled simply by finding the employee to be incapable of satisfying the singular demands of a particular job."[12]

The Eleventh Circuit's conflicting leave-based recognition of a recorded or perceived "disability" without recorded or perceived "substantial limitation" warrants this Court's attention.

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[12] *See Ray v. Glidden Co.*, 85 F.3d 227, 229 (5th Cir. 1996) (employee's termination as a result of his inability to perform his job due to restrictions on continuous, heaving lifting did not establish that employee was regarded as disabled where there is no evidence that employee was denied other jobs or that other jobs were available); *Lamury v. Boeing Co.*, 5 AD Cases (BNA) 39, 43 (D. Kan. 1995) (assignment of employee to medical work pool following injury did not establish that employee was regarded as disabled where persons assigned to work pool were considered disabled in the sense of being unable to perform specific job previously held); *Best v. Shell Oil Co.*, 5 AD Cases (BNA) 1875, 1878 (N.D. Ill. 1995) (employer's physician's statement that former truck driver could not perform "truck driving duties" and statement by employer that it placed former truck driver on long-term disability leave because he was not capable of performing essential functions of his former job are insufficient to establish truck driver was regarded as having a disability under the ADA); *Flaszna v. TNT Holland Motor Express*, 4 AD Cases (BNA) 11, 14 (N.D. Ill. 1994) ("In many cases, courts have granted summary judgment for an employer who eventually terminated an employee after first removing the employee from a particular job because of an impairment."). *See also* 29 C.F.R. § 1630.2(j)(3)(i)(ii).

B. An employer's acquiescence to an employee's assertion that she cannot perform the duties of her job and the restrictions imposed by her doctor does not constitute evidence that the employer regarded the employee as having a substantial limitation of a major life activity. Awareness of an alleged impairment alone is not sufficient.

The Eleventh Circuit held that Pritchard's disability leave from her position in the Quality Assurance Department, which was granted as a result of her own assertions that she could not perform her job rather than any belief by SCSI, constituted evidence that she was "regarded as having such an impairment". In an attempt to help her, she was placed on paid and unpaid disability leave in response to the recommendation of her counselor provided through SCSI's EAP program. The evidence in this case reveals that SCSI never treated or regarded Pritchard as having a disability; the assertion that she could not perform her job came from the plaintiff and her doctors. The Eleventh Circuit's decision sends an odd message to employers – if an employee claims that she needs help and cannot perform her job and an employer attempts to help the employee by sending her to an EAP and follow the restrictions placed upon her by her doctors, the employer will be deemed to have treated the employee as having a disability and be subject to liability under the ADA.

The legislative history and regulations governing the regarded as disabled provision of the ADA clearly establish that an employee's own perception of herself as disabled is not sufficient; rather, it is the employer's treatment of the employee as a result of myths, perceptions, and stereotypes that must be evaluated to determine if the employer regarded the employee as being disabled. The Report of the House Committee on the Judiciary explains: "The perception of the covered entity is a key element of this test. A person who perceives himself to have an impairment, but does not have an impairment, **and is not treated as if he has an impairment**, is not protected under this test." H.R. Rep. No. 101-485, 101st Cong., 2nd Sess., pt. 3, at 30, (1990), *reprinted in* 1990

U.S.C.C.A.N. 445, 452-453 (emphasis added). 29 C.F.R. § 1630.2(1) provides three categories of when an employee is regarded as disabled as follows:

> (1) Has a physical or mental impairment that does not substantially limit major life activities **but is treated** by a covered entity as constituting such a limitation;
>
> (2) Has a physical or mental impairment that substantially limits major life activities only **as a result of** the attitudes of others toward such impairment; or
>
> (3) Has none of the impairments defined . . . in this section **but is treated** by a covered entity as having a substantially limiting impairment. (emphasis added).[13]

Accordingly, the "regarded as" provision is intended to combat the effects of archaic attitudes, erroneous perceptions, and myths that disadvantage employees with or regarded as having disabilities. "A person is 'regarded as having' an impairment that substantially limits the person's major life activities when other people treat that person as having a substantially limiting impairment. The focus is on the impairment's effect upon the attitudes of others." *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995) (citing *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 279, 285 (1987)); *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437, 1444 (10th Cir. 1996) (quoting *Wooten*).

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[13] *See* EEOC Technical Assistance Manual § 2.2(c) ("This part of the definition protects people who are not substantially limited in a major life activity from disciplinary actions taken because they are perceived to have such a limitation."); Equal Employment Opportunity Comm'n, *EEOC Compliance Manual*, 902-45 (1995), *reprinted in EEOC Compl. Man. (BNA)* 902:0045 (1995) ("To determine whether an employer regards an individual as having an impairment that substantially limits major life activities, one must examine the employer's perception and treatment of the charging party.").

In accordance with the legislative history and regulations, other Circuits have agreed that an employer's acquiescence to an employee's assertion that she has an impairment does not constitute evidence that the employer treated the employee as having a disability and thus regarded the individual as disabled under the ADA. In *Byrne*, discussed above, the Seventh Circuit rejected the teacher's claim that her medical leave for more than two years, her transfer to another school because of her illness, and that the School Board was aware that her condition threatened permanent lung disease established that she was "regarded as having an impairment" by the School Board. The Seventh Circuit reasoned that the teacher's transfer and medical leave granted as a result of her own complaints that she could not teach in two particular classrooms established only that she defined herself as having an impairment rather than the School Board regarded her as having an impairment. The Seventh Circuit stated as follows:

> "The phrase 'is regarded as having such an impairment' means, *inter alia*, 'is treated . . . as having such an impairment.' " *Leckelt v. Board of Com'rs of Hosp. Dist. No. 1*, 909 F.2d 820, 825 (5th Cir. 1990). . . .
>
> In this case the School Board never doubted Ms. Byrne's ability to each, but it did acquiesce to her claim that she was unable to teach in two particular classrooms. In other words, it treated her as having an impairment because she so defined herself. *Cf. Wright v. Tisch*, 45 FEP Cas. at 153 (plaintiff herself determined that she cannot work in office).

Byrne, 979 F.2d at 567. *See Ellison v. Software Spectrum Inc.*, 85 F.3d 187, 192 (5th Cir. 1996) ("[C]ontrary to the alternative position advanced by Ellison, SSI's acquiescence in her modified schedule to accommodate her treatment does not create a material fact issue on whether she had the requisite record [of impairment].").[14]

Further, an employer's actions in response to restrictions placed on an employee by the employee's physician does not establish that the employer regarded the employee as disabled under the ADA.[15] The Eleventh Circuit equated SCSI's mere awareness that the plaintiff believed that she had an impairment with evidence that SCSI regarded her as disabled. Other Circuits have held that an employer's mere awareness of an employee's alleged impairment is insufficient to establish that the employer treated or regarded the employee as having a disability. In *Kelly v. Drexel University*, 94 F.3d 102, 109 (3rd Cir. 1996), the Third Circuit recognized that an employer's mere awareness does not establish that it regarded the employee as being impaired or that its alleged perception of the employee caused the adverse employment decision. *Id.* at 109. Similarly, the Eighth Circuit in *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1320 (8th Cir. 1996) held that Six Flags' awareness of the plaintiff's medical problems was not sufficient to establish that it perceived him as disabled.[16]

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[14] *See Johnson v. Boardman Petroleum, Inc.*, 923 F. Supp. 1563, 1568-69 (S.D. Ga. 1996). ("This suit flies in the face of the policy concerns underlying the ADA because it encourages employers to dehumanize their relationships with their employees for fear that showing concern for and recognizing their employees' emotional problems would land them in court facing a discrimination claim based upon a perceived disability."); *Mobley v. Board of Regents of University System*, 5 AD Cases (BNA) 949, 956 (S.D. Ga. 1996) (defendants' actions of commissioning an air quality study when plaintiff complained of respiratory problems, moving her to another location, and responding to requests to improve air constitute only an attempt to appease the plaintiff).

[15] *See Ray v. Glidden Co.*, 85 F.3d 227, 229-30 (5th Cir. 1996) (employee's termination as a result of restriction on continuous, heavy lifting was insufficient to establish that employer regarded employee as disabled); *Ouzts v. USAir, Inc.*, 8 Nat. Dis. Lab. Rptr. ¶ 267 p. 1052 (W.D. Pa. 1996) ("Initially, the court notes that USAir's perception of plaintiffs' impairments is based on the restrictions placed on plaintiffs' work activities by their treating physicians and on plaintiffs' own representations concerning their restrictions. There is no evidence that USAir's perception is erroneous or that it is based on myth."); *Freund v. Lockhead Missiles and Space Company*, 8 Nat. Dis. Lab. Rptr. ¶ 198 p. 789 (S.D. Ga. 1996) (It is clear that Lockheed's perceptions were not based on speculation, stereotype, or myth. The perceptions, rather were created by the medical restrictions imposed by Freund's doctor.").

VI. REMAND DESPITE A DEVELOPED RECORD CONTAINING ALTERNATE GROUNDS FOR AFFIRMING SUMMARY JUDGMENT EMASCULATES FEDERAL RULES OF CIVIL PROCEDURE RULE 56'S FUNCTION.

The Eleventh Circuit remanded the case for the District Court to determine whether Pritchard had met the other elements of her ADA and Rehabilitation Act claims despite a developed record supporting an affirmance on the basis that the other elements were not met. In doing so, the Eleventh Circuit ignored the purpose of Federal Rules of Civil Procedure Rule 56 and the decisions by this Court. When the record already supports affirming summary judgment on alternate grounds, remand thwarts the mandatory requirements governing summary judgment as espoused in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) ("The determination of whether a genuine factual dispute requires a submission to a [fact finder] must be guided by the substantive evidentiary standards that apply to the case."). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."). The record foreclosed any need for remand because Pritchard failed to present evidence that she was a qualified individual and failed to show that she had been discriminated against as a result of her disability. The fact that the District Court did not rule on these elements is irrelevant. *See Jaffe v. Dunham*, 352 U.S. 280, 281 (1957) ("A successfull party in the District Court may sustain its judgment on any ground that finds support in the record.").

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[16] *See Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191 (5th Cir. 1996) (statement showing awareness of employer that employee had cancer was insufficient to establish that employer treated or regarded employee as disabled); *Milatz v. Frito-Lay, Inc.*, 1997 U.S. App. LEXIS 599 at *6 (10th Cir. Jan. 15, 1997) ("Frito-Lay's awareness of [Milatz's injury and worker's compensation rating] does not establish a 'record of impairment' under subjection (B).").

CONCLUSION

The scope of *all* ADA protection depends upon the contours of protection afforded actual, recorded, and perceived impairments. Conflict among the Circuits on this issue mandates this Court's prompt review. For the foregoing reasons, the petition for a writ of certiorari to issue to review the opinion of the United States Court of Appeals for the Eleventh Circuit is due to be granted.

Respectfully submitted,

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Sue PRITCHARD, Plaintiff-Appellant,

v.

The SOUTHERN COMPANY SERVICES,
Don Welliver, Jeff Prince,
Defendants-Appellees.

No. 95-6312.

United States Court of Appeals,
Eleventh Circuit.

Aug. 28, 1996.

Female employee, suffering from depression, brought action against employer and its officials, alleging violations of the Americans with Disabilities Act (ADA), Rehabilitation Act, and Title VII. The United States District Court for the Northern District of Alabama, No. CV 94-N-475-S, Edwin L. Nelson, J., 1995 WL 338662, granted summary judgment for defendants, and employee appealed. The Court of Appeals, Fay, Senior Circuit Judge, held that: (1) material issue of fact as to whether employee was disabled within meaning of ADA precluded summary judgment for employer; (2) employee could not use inadmissible hearsay testimony to defeat employer's motion for summary judgment on Title VII claim when hearsay could not be reducible to admissible form at trial; and (3) employee failed to establish that employer's proffered nondiscriminatory reason for her discharge was nonbelievable and, therefore, failed to defeat employer's motion for summary judgment on Title VII claim.

Affirmed in part; reversed in part; remanded.

Deborah A. Mattison, Birmingham, AL, for appellant.

John J. Coleman, III, Teresa G. Minor, Birmingham, AL, for appellees.

Appeal from the United States District Court for the Northern District of Alabama.

Before CARNES, Circuit Judge, and FAY and GIBSON,* Senior Circuit Judges.

FAY, Senior Circuit Judge:

Sue Pritchard, an employee of Southern Company Services ("SCSI") brought suit against the company and two company officials under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. The District Court granted summary judgment for the defendants on all counts. Pritchard appealed the court's order of summary judgment in regard to the company. Because we find genuine issues of material fact, we reverse the District Court's order of summary judgment for the claims under the ADA and the Rehabilitation Act. We affirm as to the Title VII claim.

I. BACKGROUND

Sue Pritchard was hired as an electrical engineer by SCSI in 1986, working mostly on nuclear facilities. In July 1990 she was diagnosed as having depression. This depression was exacerbated by the stress involved with her work on nuclear projects. She requested and received a transfer to the Quality Assurance Department, but this work also involved nuclear energy and her depression grew worse. In early 1992 she tendered her resignation to her immediate supervisor, but he refused to accept it. Instead, Pritchard was placed on paid disability leave through November of 1992, and then on unpaid disability leave.

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* Honorable John R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Pritchard's doctors treated her for depression and dysautonomia during this period. Her symptoms included profound fatigue, suicidal thoughts, difficulty sleeping, difficulty communicating, difficulty concentrating, and an irregular heartbeat. She was placed on medication, and by January of 1993 her doctor stated she could return to work, but not in the nuclear field. Working on nuclear projects exacerbated her stress and therefore her symptoms. However, SCSI did not transfer her. The company contends that all its engineers must have the flexibility to perform nuclear-related work, and that it would have been her responsibility to apply for any non-engineering job. She contends that certain engineering jobs require little or no nuclear work, and that she was told she would be considered for non-engineering jobs.[1] She was terminated on June 18, 1993.

Pritchard brought suit in early 1994. The District Court granted summary judgment for the defendants on all claims. Pritchard appealed the order of summary judgment for SCSI.

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[1] We recognize that this is a controversy that will have to be resolved by the factfinder.

II. STANDARD OF REVIEW

Summary judgment is proper if the pleadings, depositions, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corporation v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The evidence must be viewed in the light most favorable to the non-moving party. *Augusta Iron and Steel Works, Inc. v. Employers Insurance of Wausau*, 835 F.2d 855, 856 (11th Cir.1988). We review any conclusions of law *de novo*. *U.S. v. Thomas*, 62 F.3d 1332, 1336 (11th Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1058, 134 L.Ed.2d 202 (1996).

III. ANALYSIS

A. The Americans with Disabilities Act

In order to establish a prima facie case under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.*, Pritchard must show that: 1) she has a disability, 2) she is a qualified individual, and 3) she was discriminated against because of the disability. *See* 42 U.S.C. § 12132. Disability is defined as:

> A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> B) a record of such impairment; or

> C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). Depression has been held to constitute a mental impairment. *See, e.g., Doe v. Region 13 Mental Health-Mental Retardation Commission*, 704 F.2d 1402, 1408 (5th Cir.1983).[2] However, in order to constitute a disability under the ADA, the impairment (as suffered by the plaintiff in this particular case)[3] must substantially limit a major life activity.

Pritchard claims that her depression substantially limited her ability to function, sleep, concentrate, and communicate. The District Court reasoned, however, that in order for Pritchard to have been discriminated against because of her disability, she had to have been disabled when she was terminated, not at some point in the past. The court found that Pritchard was terminated in June of 1993 and that she presented no evidence that her depression affected any major life activity after December of 1992. Her doctors stated that she was unable to work in any capacity up to December of 1992, but SCSI did not terminate her during that period. She was put on disability leave.

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[2] *Doe* involved the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, but Congress intended for courts to rely on Rehabilitation Act cases when interpreting similar language in the ADA. 29 C.F.R. § 1630.2(g) and (m) (App.).

[3] "The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual." 29 C.F.R. § 1630.2(j) (App.).

By January of 1993 Pritchard was able to work in a non-nuclear position. The court found that her condition had improved substantially by then. Her doctor stated that she would be able to perform up to her normal level of excellence in any non-nuclear job. Pritchard contends that she was qualified to work as an Electrical Designer (Substation), as a Senior Designer for SCSI Fossil/Hydro, as an Integrated Resource Planning Analyst, and as a Telecommunications Engineer. The job descriptions for each of these positions specifically demanded the ability to concentrate and/or communicate effectively. The court ruled that:

> if the plaintiff was, as she has asserted, qualified for numerous positions, all which required the plaintiff to possess the ability to effectively communicate . . . and concentrate, it does not follow that the plaintiff was simultaneously substantially limited in those same areas. Likewise, the plaintiff has presented no evidence that her ability to sleep or "function" was substantially limited at the time she was terminated.

(footnotes omitted). Pritchard did present evidence suggesting problems sleeping and functioning prior to December 1992, but according to the court:

> such sleep pattern problems as well as a substantial limitation on the ability to "function" would not be consistent with the plaintiff's assertions, and those of her doctors, that she was capable of regular employment in any capacity other than one involving nuclear work.

The court concluded that Pritchard's evidence as to impairment at the time of her termination only showed that she could not work in the nuclear field. Pritchard contended that even this alone would be sufficient to impair a major life activity: working. In order for a condition to substantially limit the ability to work, it must "significantly restrict[ ] . . . the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(I).

An impairment does not substantially limit the ability to work merely because it prevents a person from performing "either a particular specialized job or a narrow range of jobs." 29 C.F.R. § 1630.2(j)(3) (App.). Nor does the "inability to perform a single, particular job . . . constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(I). The District Court ruled:

> It is undisputed that the plaintiff's condition precludes her from working as an engineer in the nuclear field. However, by [her] own admissions, she is qualified and capable of working as an engineer in the non-nuclear field, as well as in numerous other jobs that exist at SCSI and elsewhere. Accordingly, [her] impairment does not substantially limit the major life activity of working.

The District Court recognized that depression is a "serious and potentially tragic" illness, but also found that it exists in degrees. In this case, according to the court, the illness prevents a trained electrical engineer from working in the nuclear field. The District Court held that such an impairment does not by itself constitute a disability under the ADA.

We agree with the court's legal conclusion: such an impairment, by itself, does not constitute a disability under the ADA. However, we find that there is a genuine issue of material fact as to whether Pritchard suffered other symptoms when she was terminated and as to whether those symptoms substantially limited a major life activity.

Pritchard stated in an affidavit that she suffers from depression and dysautonomia, that she continues to have such conditions, and that they substantially limited her ability to function at the time of her termination. Her symptoms included profound fatigue, difficulty sleeping and communicating, difficulty concentrating, and experiencing suicidal thoughts. In her deposition in June of 1994, Pritchard stated that she was still taking medication for her conditions.

Dr. Samuel Saxon stated in an affidavit that Pritchard's symptoms included marked fatigue, lack of energy, lack of interest, poor concentration, memory problems, suicidal thoughts, depressed affect, and irritability. Work in the nuclear field exacerbated her stress and thus her symptoms. In his opinion, Pritchard was able to return to work outside the nuclear field in January of 1993, but *she was still experiencing physical and mental symptoms.*

It is true that these statements may be read to conflict with Pritchard's contention that she was able to return to work in January of 1993. However, taking the evidence in the light most favorable to Pritchard, it is possible that both are true: she still suffered from these symptoms and they limited major life activities, but she was able to control them sufficiently with the help of medication to perform at work in the non-nuclear field.[4] We think this evidence presents a case for a jury to determine whether she suffered from those symptoms when she was terminated, and whether those symptoms substantially limited a major life activity.

Moreover, the ADA defines disability as:

> A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> B) a record of such impairment; or
>
> C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). Pritchard was placed on paid disability leave through November of 1992, and then on unpaid disability leave. This constitutes evidence that Pritchard had a record of being impaired and that SCSI regarded her as being impaired. Again, this evidence creates genuine issues of material fact as to whether Pritchard was disabled under the ADA.

Of course, in order to prevail, Pritchard must not only show that she has a disability, but also that she was discriminated against because of her disability[5] and that she was a qualified individual. *See* 42 U.S.C. § 12132. The

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[4] We think the evidence in the record could be read to conclude that Pritchard is unable to work in the nuclear field even with the help of medication.

[5] The failure to provide reasonable accommodations, including a transfer to a vacant position, constitutes discrimination under the ADA. 42 U.S.C. § 12112.

District Court did not rule on these elements in its summary judgment order. We leave the issues open on remand.

B. The Rehabilitation Act of 1974

"The standards used to determine whether this section has been violated . . . shall be the standards applied under title I of the Americans with Disabilities Act of 1990 . . . " 29 U.S.C. § 794(d). Thus if Pritchard may be found to be disabled under the ADA, then she may be found to be disabled under the Rehabilitation Act.

The District Court did not decide whether SCSI is governed by the Rehabilitation Act as a recipient of federal assistance. Because we find a genuine issue of material fact as to whether Pritchard was disabled, we must vacate the judgment on her claim under the Rehabilitation Act. However, we do not decide whether SCSI is a recipient of federal assistance, and we leave that issue open on remand.

C. Title VII

For purposes of the Title VII claim, the District Court assumed that Pritchard had established a prima facie case, but then held that SCSI "satisfied its burden of production by articulating a legitimate nondiscriminatory reason for discharge and presenting evidence in support thereof." SCSI presented evidence that: all engineers within the Engineering Organization must possess the flexibility to accept nuclear related projects; engineers are subject to transfer according to the needs of the company;

male and female employees who have refused transfers have been terminated. In response, Pritchard's evidence must be sufficient to allow a reasonable factfinder to conclude that SCSI's non-discriminatory reason for discharge is not believable. *See Howard v. BP Oil Co.,* 32 F.3d 520, 526 (11th Cir.1994).

Pritchard's deposition testimony was the only evidence Pritchard presented that conflicted with the non-discriminatory reason for discharge. Specifically, she stated that: 1) she had heard of a male employee named Loren Secrist who was transferred to a non-nuclear position; 2) she did not know for certain why he was transferred but she thought it was related to the stress of nuclear work; 3) she thought he was an engineer, but she was not certain; 4) all of her information about Mr. Secrist came from conversations with co-workers; and 5) she could not recall the names of any of the co-workers who had provided this information.

SCSI presented an affidavit from the Manager of Employee Relations and Safety, Carl Watts. He stated that: 1) it was his understanding that SCSI employment policies required Engineering Organization employees to be able to work on nuclear projects; 2) in his experience, these policies were followed; 3) his review of SCSI personnel records revealed no instance in which an engineer had been permanently assigned to a position that did not require the flexibility to work on nuclear projects; 4) numerous engineers had been required to either accept nuclear work or be terminated; and 5) Loren Secrist performed nuclear related duties immediately prior to his termination, and he was never transferred to a non-nuclear position in order to accommodate any disability.

Ms. Pritchard's statements in her deposition constitute inadmissable hearsay. It is true that inadmissable hearsay may sometimes be considered by a court when ruling on a summary judgment motion. *See Church of Scientology Flag Service Org., Inc. v. City of Clearwater,* 2 F.3d 1514, 1530 (11th Cir.1993), *cert. denied,* ___ U.S. ___, 115 S.Ct. 54, 130 L.Ed.2d 13 (1994); *Offshore Aviation v. Transcon Lines, Inc.,* 831 F.2d 1013, 1015 & n. 1 (11th Cir.1987). However, Pritchard cannot use inadmissable hearsay to defeat summary judgment when that hearsay will not be reducible to admissible form at trial. *See McMillian v. Johnson,* 88 F.3d 1573 (11th Cir.1996). There is nothing to indicate that Pritchard's statements (which were based on the statements of unknown co-workers) will lead to admissible evidence. On the contrary, her statements were refuted by SCSI's evidence (the affidavit of Carl Watts) which can be reduced to admissible form at trial (the testimony of Carl Watts). Thus Pritchard presented no evidence that can be reduced to admissible form at trial and which conflicts with SCSI's non-discriminatory reason for discharge.[6]

IV. CONCLUSION

We conclude that the District Court erred when it granted SCSI summary judgment under the ADA and the Rehabilitation Act. We affirm the summary judgment as to the Title VII claim.

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[6] Pritchard's Title VII claim was based upon allegations of gender discrimination. This has nothing to do with whether SCSI could accommodate her disability if in fact she establishes one.

AFFIRMED in part; REVERSED in part; and REMANDED for further proceedings.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

SUE PRITCHARD,	]	
Plaintiff(s),	]	
	]	
vs.	]	CV-94-N-0476-S
SOUTHERN COMPANY SERVICES, INC., et al.,	]	
	]	
Defendant(s).	]	

Memorandum of Opinion

I. Introduction.

This is a civil action brought by plaintiff Sue Pritchard ("Ms. Pritchard" or the "plaintiff") under provisions of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.*, (the "ADA"), § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* The defendants are Southern Company Services, Inc. ("SCSI" or the "defendant"), Jeff Prince ("Mr. Prince") and Don Welliver ("Mr. Welliver"). Ms. Pritchard claims the defendants discriminated against her by discharging her from her employment with SCSI for reasons motivated by her disability and gender. The court has for consideration the defendants' motion for summary judgment. The motion has been briefed and argued and was submitted at the court's regularly scheduled motion docket on February 24, 1995. The defendants' motion will be granted.

II. Material Undisputed Facts.

The facts set out below are gleaned from the parties' submission of facts claimed to be undisputed, their respective responses to those submissions and the court's own examination of the evidentiary record.[1]

Sue Pritchard accepted employment with SCSI as a technical aide in July 1978. In 1979, she worked as a co-op for SCSI before taking a leave of absence to pursue her Bachelor of Science degree in Electrical Engineering. After she obtained that degree, the plaintiff was hired by SCSI as an Assistant Engineer in its Engineering Organization. She worked in that role at Plant Hatch, a nuclear power plant, from January 1986 until March 1987 when she was moved to Plant Vogtle, also a nuclear plant, to serve in the same capacity. At Plant Vogtle, Ms. Pritchard's duties involved primarily design work. While at that location, the plaintiff was promoted to the position of Engineer II, and then later, in April 1990, to the position of Engineer I. In these capacities, Ms. Pritchard's electrical engineering duties consisted primarily of design changes based upon documentary review. Ms. Pritchard continued to work on the Plant Vogtle project until May 1991.

In July 1990, the plaintiff was diagnosed as having depression, resulting in increased stress with regard to work in areas involving nuclear energy. She became increasingly concerned with her abilities to complete the volume of work assigned to her within the work imposed deadlines. At least in part, because of her concerns with performing nuclear design work, the plaintiff requested a transfer to the Quality Assurance Department, also within the Engineering Organization. When a position within the Quality Assurance Department opened, Ms. Pritchard interviewed for, and ultimately received, the position.

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[1] These are the "facts" for summary judgment purposes only. They may not be the actual facts. *Cox v. Administrator United States Steel & Carnegie Pension Fund,* 17 F.3d 1386, 1400 (11th Cir. 1994).

In her new duties in Quality Assurance, Ms. Pritchard participated in audits of nuclear power generating plant support engineering projects for compliance with applicable regulatory standards and audits of non-nuclear projects for compliance with SCSI's Engineering Basic Quality Program. Thus, rather than being directly responsible for the design work that she had done on her previous assignment, Ms. Pritchard, in Quality Assurance, was responsible for auditing similar work actually performed by others.

Ms. Pritchard's stress and anxieties were not significantly lessened by her move to the Quality Assurance department where the majority of her work continued to be on nuclear projects. All engineers in the Quality Assurance Department within the Engineering Organization were required to perform audits on nuclear projects. Ms. Pritchard stated in her deposition that while auditing nuclear projects, she began to encounter the same sort of anxiety that she had experienced when she did the design work herself. Specifically, Ms. Pritchard stated that her anxieties were triggered, at least in part, by her belief that work on safety related systems may not have been getting an adequate review by the designer.

In March or April 1992, Ms. Pritchard tendered her resignation to her immediate supervisor, Mr. Robert Conry. She indicated to him that her decision was related to her anxiety regarding nuclear power work. Mr. Conry declined to accept her resignation and suggested instead that she seek assistance through SCSI's Employee Assistance Program ("EAP"). Mr. Conry informed Ms. Pritchard that he was pleased with her level of performance and that he was happy for her to remain in her position at her then current level of performance.

Following her discussion with Mr. Conry, Ms. Pritchard contacted SCSI's EAP and was referred to Mary Trimm with Montclair Counseling Center. By letter dated April 29, 1992, Ms. Trimm recommended that Ms. Pritchard be given approximately one month off from work to alleviate her depression. In response to Ms. Trimm's recommendation, SCSI placed Ms. Pritchard on a paid disability leave from May 1, 1992, through November 12, 1992. On November 13, 1992, Ms. Pritchard's paid leave of absence period expired and SCSI placed Ms. Pritchard on an unpaid medical leave of absence.

According to a "Statement of Disability" submitted to SCSI by Dr. Charles Neville and dated April 4, 1994, Ms. Pritchard first received treatment for depression on August 3, 1990. Dr. Neville began treating Ms. Pritchard on June 23, 1992, at which time he diagnosed her as having "major depression, recurrent, with suicidal thoughts." On July 20, 1992, Dr. Samuel Saxon completed an MMPI on Ms. Pritchard which indicated "depression and the presence of psychosomatic symptoms including significant fatigue, pain, [and] gastrointestinal disorders." Dr. Saxon also stated that, at that time, Ms. Pritchard "demonstrated severe obsessionalism and anxiety."

On August 26, 1992, Ms. Pritchard was seen by Dr. Virginia Pascual at the Sleep Disorder Center of Alabama. Dr. Pascual opined that she suffered from dysautonomia based upon her clinical symptomatology and the profound fatigue she reported. Dr. Pacual [sic] also reported that Ms. Pritchard's condition "substantially limited her sleeping patterns, concentration and memory recall. . . . [and] affected [her] ability to communicate." On an SCSI Disability Certification form dated September 4, 1992, Dr. Neville indicated that Ms. Pritchard suffered from "severe depression and severe fatigue due to dysautonomia" which prevented her from returning to her regular duties at that time.

Though receiving treatment for her depression and resulting conditions during her paid leave of absence, Ms. Pritchard was unable to perform any work from April 1992 through December 1992.

In December 1992, the plaintiff attended the Quality Assurance Department Christmas luncheon where she told Mr. Conry that she was prepared to return to work in a capacity that did not involve any work related to work in the nuclear field. Dr. Neville responded to a SCSI request for his opinion in a letter dated January 29, 1993, stating that Ms. Pritchard's prognosis was "excellent." According to Dr. Neville, her condition had improved to the level that she could return to work so long as the work was not in the "nuclear field." Dr. Neville stated:

> The nuclear field seems to have stress that is very difficult for Mrs. Pritchard to cope with. Stress in that job situation seems to have contributed to her depression and to her decompensation requiring time off from work.

With respect to non-nuclear work, Ms. Pritchard's condition had improved to the extent that Dr. Neville expected her to perform "essentially up to her usual level of excellence."

On January 29, 1993, Ms. Pritchard contacted Mr. Prince to discuss her condition and employment possibilities. Mr. Prince informed her that flexibility to accept nuclear related assignments was required of all engineers within SCSI's Engineering Organization. Ms. Pritchard stated that she was unaware of such a requirement. She also explained that she could not perform nuclear related work but would be interested in a position that would not require any work in that area. According to Ms. Pritchard's deposition, Mr. Prince informed her that if she could not return to her current position in Quality Assurance, "it would be [her] responsibility to apply for employment elsewhere at SCS[I] if [she] wished to continue there."

By letter dated February 15, 1993, Mr. Prince contacted Ms. Pritchard to "follow up" the conversation of January 29. He informed Ms. Pritchard that her Disability Leave of Absence was continued until May 15, 1993, but any additional continuances would require a certification of disability from her treating physician. Mr. Prince acknowleged [sic] receipt of Dr. Neville's January 29 letter but stated that it was insufficient as a certification of disability. He also stated that "[m]ost of the engineering positions at SCS[I] require either nuclear or assignments similar to nuclear, and the flexibility [of] an employee to accept nuclear work assignments." He concluded by requesting that Ms. Pritchard provide a more definite statement of disability prior to May 15, 1993.

In May 1993, Ms. Pritchard contacted Mr. Carl Watts, SCSI's Manager of Employee Relations and Safety, seeking a clarification of Mr. Prince's February 15 letter. In that conversation, she stated that she wanted to return to work in another area of the company. She inquired about whether she was being considered for other positions within SCSI and informed Mr. Watts that Mr. Prince had indicated to her that it was her responsibility to apply for other positions.

On May 17, 1993, Ms. Pritchard again contacted Mr. Prince by phone and letter. She reiterated her desire to return to work so long as her assignments were not in nuclear related work. She also disagreed with Mr. Prince's statement concerning the requirement that all engineers possess the flexibility to accept nuclear assignments. In his "follow up" letter to the May 17 communications, Mr. Prince informed the plaintiff that she had not provided SCSI with a more definite statement regarding her claimed disability as she had been requested to do and requested that she submit such a certification by May 28, 1993, to avoid termination.

By letter dated May 25, 1993, at the request of the plaintiff, Dr. Neville wrote Mr. Prince a second letter but merely repeated the evaluation he had given before. Specifically, Dr. Neville stated that Ms. Pritchard was able to return to work "but it is not recommended that she return to work in the nuclear field." After discussing the situation with Mr. Welliver, a SCSI senior engineer, and Mr. Watts, Mr. Prince made a telephone call to Dr. Neville to inquire as to what he meant by limiting her work to "non-nuclear." Dr. Neville declined to answer because Ms. Pritchard had instructed him to communicate with SCSI by written responses to written questions only.

By letter dated May 24, 1993, Ms. Pritchard explained to Mr. Prince what she described as a "Catch-22." She stated:

> The job position I held at the time I became too ill to work involved work in the nuclear field. My doctor recommends that I not return to nuclear work at this time. It is my understanding that if my doctor deems me disabled from working in nuclear, but not in non-nuclear, then you consider me not disabled and you will "terminate" me.

Ms. Pritchard also reiterated that her health had improved to the point that she then was capable of returning to work at the present time so long as the work was not in the nuclear field.

On June 18, 1993, Ms. Pritchard met with Mr. Welliver and Mr. Watts at the request of Mr. Welliver. At the meeting, Mr. Welliver informed Ms. Pritchard that she was terminated since she did not possess the flexibility to work on nuclear projects.

III. Standard of Review.

Under Fed. R. Civ. P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The party asking for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. The movant can meet this burden by presenting evidence showing there is no dispute of material fact, or by showing the nonmoving party has failed to present evidence in support of some element of his case on which he bears the ultimate burden of proof. *Id.* at 322-23; *see* Fed. R. Civ. P. 56(a) and (b). There is no requirement, however, "that the moving party support its motion with affidavits or other similar materials negating the opponent's claim." *Celotex*, 477 U.S. at 323.

Once the moving party has met his burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions of file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex*, 477 U.S. at 324. The nonmoving party need not present evidence in a form necessary for admission at trial, however he may not merely rest on his pleadings. *Id.* "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322.

After a properly made motion has been properly responded to, the court must grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The substantive law win identify which facts are material and which are irrelevant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249. His guide is the same standard necessary to direct a verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52; *see also Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 745 n.11 (1983). However, the nonmoving party "must do more than show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Anderson*, 477 U.S. at 249 (citations omitted); *accord Spence v. Zimmerman*, 873 F.2d 256 (11th Cir. 1989).

Furthermore, the court must "view the evidence presented through the prism of the substantive evidentiary burden," so there must be sufficient evidence on which the jury could reasonably find for the plaintiff. *Anderson*, 477 U.S. at 254; *Cottle v. Storer Communication, Inc.*, 849 F.2d 570, 575 (11th Cir. 1988). Nevertheless, credibility determinations, the weighing of evidence, and the drawing of inferences from the facts are the function of the jury, and therefore the evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor. *Anderson*, 477 U.S. at 255. The nonmovant need not be given the benefit of every inference but only of every reasonable inference. *Brown v. City of Clewiston*, 848 F.2d 1534, 1540 n.12 (11th Cir. 1988).

IV. Discussion.

A. Claims Against Defendant SCSI.

1. The Americans with Disabilities Act.

To establish a prima facie case of discriminatory discharge in violation of the ADA, the plaintiff must establish that: (1) she has a "disability," (2) she is a "qualified individual," and (3) she is suffering discrimination "by reason of such disability." 42 U.S.C. § 12132. There is very little precedent in this circuit explaining or elaborating on the provisions of the ADA. However, it is generally conceded that cases decided under the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* (1993), provide helpful insight to review of claims arising under the ADA. *See, e.g., Milton v. Bob Maddox Chrysler Plymouth, Inc.*, 868 F. Supp. 320 (S. D. Ga. 1994); *Sawinski v. Bill Currie Ford, Inc.*, 866 F.

Supp. 1383 (M. D. Fla. 1994); *see also*, Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(g) and (m) (App.) (noting congressional intent to rely on cases interpreting the Rehabilitation Act in reviewing ADA claims). In addition, the ADA itself, in conjunction with regulations and interpretive commentary, provides useful guidance.

The defendant first argues that the plaintiff is not "disabled" within the meaning of the ADA. A "disability" under the ADA is defined as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). The plaintiff contends that she is "disabled" within the meaning of both (A) and (C).

The regulations define "physical or mental impairment" as "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine. . . . " 29 C.F.R. § 1630.2(h). The plaintiff has presented evidence to suggest that at the time she was terminated she suffered from depression which caused her to experience increased stress concerning work in the nuclear field. (Pl. Ex. 17) Depression constitutes a "mental impairment" under the ADA. *See, e.g., Doe v. Region 13*

Mental Health – Mental Retardation Commission, 704 F.2d 1402 (5th Cir. 1983); *Stradley v. Lafourche Communications, Inc.,* 869 F. Supp. 442, 443 (E. D. La. 1994).

Although depression constitutes a "physical or mental impairment" under the ADA, it does not rise to the level of a "disability" unless it substantially limits a major life activity. *Stradley,* 869 F. Supp. at 443. " '[M]ajor life activities' are those basic activities that the average person in the general population can perform with little or no difficulty." 29 C.F.R. § 1630.2(i) (App.). They include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.* "An impairment is substantially limiting if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person in the general population's ability to perform that same major life activity." 29 C.F.R. § 1630.2(j) (App.). In determining whether an impairment substantially limits a major life activity, the court should consider: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment. 29 C.F.R. § 1630.2(j)(2).

The plaintiff contends that her depression substantially limits her ability to "function, sleep, concentrate and communicate." Although these activities are not specifically delineated in the regulations, the non-exhaustive list of "major life activities" contained therein is sufficiently expansive so as to preclude a determination as a matter of law that the ability to "function, sleep, concentrate and communicate" would not be included. *See, Fitzpatrick v. City of Atlanta,* 2 F.3d 1112, 1126 (11th Cir. 1993).

The plaintiff has presented no evidence that her medical condition affected any "major life activity" after December 1992. It may be inferred from her inability to perform any work during the period from April 1992 through December 1992 that these activities were affected during that period. However, the defendant took no adverse employment action with regard to Ms. Pritchard during this period. In fact, when the plaintiff tendered her resignation in April 1992 and informed the defendant of her mental condition, the defendant refused to accept it. Rather, according to the plaintiff, Mr. Conry expressed sympathy and a willingness to accommodate her condition. He suggested that she take time to recover so that she could return to work. Ultimately, the defendant placed the plaintiff on a paid leave followed by unrequested and extended nonpaid leaves. This course of conduct does not constitute an adverse employment action.

The plaintiff must present some evidence that she was "disabled" at the time of the adverse employment action. *See, McDaniel v. Mississippi Baptist Medical Center,* ___ F. Supp. ___, 1995 WL 88180, *4 (S. D. Miss. 1995). It is not sufficient to establish that a "disability" existed at some time in the past when no adverse employment action occurred. In the present case, the plaintiff's employment termination occurred in June 1993, over six months after the plaintiff, by her own admission, had recovered from her medical condition to the extent that she was capable of returning to regular employment in a non-nuclear capacity.

The record before the court demonstrates that the major life activities specifically identified by the plaintiff – function, sleep, concentrate and communicate – were not substantially limited at the time her employment was terminated nor for approximately six months prior to that time. For example, plaintiff ardently claims that she was qualified for numerous positions at SCSI that did not require work with nuclear power. She contends that she was qualified for the position of Electrical Designer (Substation) advertised in the job posting of January 6, 1993. However, the job description states that "essential duties" specifically include the ability to "concentrate" up to 66% of the time during an eight hour day. (Pl. Ex. 27) Plaintiff states that she was qualified for the position of "Senior Designer, SCSI Fossil/Hydro" which was advertised in the job listing dated January 6, 1993. However, the brief job description contained in the job posting stated that the "[i]ndividual should demonstrate good interpersonal communication skills." (Pl. Ex. 28) Plaintiff states that she was qualified for the position of Integrated Resource Planning Analyst which was advertised in the job posting dated January 27, 1993. The brief job description contained in the job posting stated that the candidate "should also be able to input and organize data bases; communicate effectively; possess interpersonal, organizational and project management skills." (Pl. Ex. 29) Plaintiff states that she was qualified for the position of Telecommunications Engineer which was advertised on February 3, 1993. The mental demands required for this position included the ability to "communicate accurately in written and oral communications" as often as 100% of the time during an eight hour day, and "concentrate" as often as 66% of the time during an eight hour day. (Pl. Ex. 30) Plaintiff states that she was qualified for the position of Engineer Analyst Utility Services advertised in the job posting dated March 17, 1993. However, the job description states that the candidate "[m]ust have excellent communication skills." (Pl. Ex. 32) Plaintiff states that she was qualified for the position of "Secretary II/Sr. Sec. I – Public Relations" advertised in the job listing dated April 14, 1993. However, this job requires that the candidate possess "good written and oral communication skills," and have the ability to "concentrate" up to 66% of the time during an eight hour day. (Pl. Ex. 33) Plaintiff asserts that she was qualified for the position of Accounting Associate advertised in the job posting dated May 5, 1993. However, the job description states the position requires "oral and written communication skills to clearly and effectively interact with others," as well as the ability to "concentrate" up to 66% of the time during an eight hour day. (Pl. Ex. 35)

The plaintiff does not specifically indicate how the major life activities of concentration and communication were substantially limited by her depression. However, if the plaintiff was, as she has asserted, qualified for numerous positions all of which required the plaintiff to possess the ability to effectively communicate, orally and written, and concentrate, it does not follow that the plaintiff was simultaneously substantially limited in those same areas.

Likewise, the plaintiff has presented no evidence that her ability to sleep or "function"[2] was substantially limited at the time she was terminated. Dr. Virginia Pascual, from the Sleep Disorder Center of Alabama, in a declaration dated December 14, 1992, indicated that the plaintiff had reported sleep pattern problems including a difficulty sleeping at night and a tendency to sleep all day long. However, the record is void of evidence suggesting that these conditions persisted after December 1992 when the plaintiff declared she was able to return to regular employment. Indeed, such sleep pattern problems as well as a substantial limitation on the ability to "function" would not be consistent with the plaintiffs assertions, and those of her doctors, that she was capable of regular employment in any capacity other than one involving nuclear work.

The plaintiff also contends that her depression substantially limits the major life activity of working. To demonstrate that an impairment "substantially limits" the major life activity of working, an individual must show "significant[ ] restrict[ion] in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(I). In addition to the three factors previously mentioned, the regulations state that the following factors may also be considered in determining whether an individual is substantially limited in the major life activity of "working."

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[2] The plaintiff does not elaborate on the meaning of this purported major life activity. However, the court assumes that the ability to "function" is somewhat akin to the ability to care for one's self, which is specifically delineated in the regulations as a "major life activity."

> (A) The geographical area to which the individual has reasonable access;
>
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills, or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(j)(3).

Plaintiff has presented the affidavit of Dr. Mary House Kessler, vocational specialist, purportedly to create a factual issue with respect to whether the plaintiff's ability to work has been substantially limited by her inability to work as an engineer in the nuclear field. Dr. Kessler stated that in Alabama, there were 7,500 electrical and electronic engineers in 1990 and 6,900 electrical engineers at the end of 1993. Furthermore, it is projected that by the year 2005, there will be approximately 11,000 electrical and electronic engineers in the state. Dr. Kessler also stated that, including nuclear engineers, approximately 8,300 jobs presently exist which expose a worker to nuclear energy.

While these statistics might be interesting, they do not demonstrate that the plaintiff's impairment has disqualified her from a class of jobs or a broad range of jobs in various classes as required by the ADA. The mere fact that the plaintiff's condition disqualifies her for approximately 8,300 jobs, without more, says nothing about the existence of engineering jobs that do not expose a worker to nuclear energy.[3] The major life activity of working is not substantially limited merely because an impairment prevents an individual from performing "either a particular specialized job or a narrow range of jobs." 29 C.F.R. § 1630.2(j)(3) (App.) (citing *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986); *Jasany v. United States Postal Service*, 755 F.2d 1244 (6th Cir. 1985); *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Hawaii 1980)). Dr. Kessler's statistics do not indicate that an inability to work in a nuclear related capacity disqualifies an electrical engineer from working as an electrical engineer, or from using electrical engineering expertise in other related occupational areas.

Furthermore, "[t]he inability to perform a single, particular job does not constitute a substantial information in the major life activity of working." 29 C.F.R.

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[3] It is not clear by Dr. Kessler's statement what categories of jobs are included in the 8,300 positions in the state which expose a worker to nuclear energy. She indicates that this number includes nuclear engineering positions, of which the plaintiff may be disqualified even absent her condition since the plaintiff's degree is in electrical engineering.

§ 1630.2(j)(3)(i). The Sixth Circuit has stated that "an impairment that interfered with an individual's ability to do a particular job, but did not significantly decrease that individual's ability to obtain satisfactory employment otherwise, was not substantially limiting within the meaning of the statute. *Jasany v. United States Postal Service*, 755 F.2d 1244, 1248 (6th Cir. 1985); *see also, Welsh v. City of Tulsa*, 977 F.2d 1415, 1417 (10th Cir. 1992) (holding that under the Rehabilitation Act, the major life activity of working does not necessarily mean working at the job of one's choice). It is undisputed that the plaintiff's condition precludes her from working as an engineer in the nuclear field. However, by the plaintiff's own admissions, she is qualified and capable of working as an engineer in the non-nuclear field, as well as in numerous other jobs that exist at SCSI and elsewhere. Accordingly, plaintiff's impairment does not substantially limit the major life activity of working.

Alternatively, the plaintiff asserts that she was "disabled" within the meaning of the ADA because the defendant "regarded" her as having an impairment that substantially limits a major life activity. *See,* 29 C.F.R. § 1630.2(g)(3). An individual is "regarded" as having a disability if she:

> (1) Has a physical or mental impairment that dos [sic] not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
>
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

> (3) [Is not physically or mentally impaired] but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(*l*). The plaintiff does not indicate how the defendant regarded her as disabled nor does she specifically point to evidence in the record to confirm her claim. On the other hand, the record suggests that the defendant regarded the plaintiff as capable of performing her job *despite* her impairments. The plaintiff informed Mr. Conry prior to April 1992 and shortly after joining Quality Assurance that she had been diagnosed with "depression" and a "chemical disbalance." There is nothing in the record to suggest that Mr. Conry or any other representative of SCSI regarded the plaintiff as substantially limited in a major life activity or any capacity as a result of this knowledge. In fact, when the plaintiff expressed a desire to transfer to Quality Assurance in part to alleviate stress and anxieties resulting from her medical condition, the defendant accommodated her request. In addition, Mr. Conry's response to the plaintiff after she tendered her resignation is not consistent with the plaintiff's bare bones allegation in brief that the defendant perceived her as disabled. When asked how Mr. Conry reacted, the plaintiff stated:

> He asked me do you want to be able to work, and I said yes, and he said would you consider going to the employee assistance program and trying to get some help from them to see if you can return to work, and I said yes.

* * *

> He told me that he was happy with my current level of performance and that since my illness was affecting me so severely that he could understand my need to do something to relieve the problem, to get better, but that as far as he was concerned, if I continued at my current level of effectiveness and production, he would be happy to have me stay there at that time.

(Pl. depo. at 179-80)

The rationale for categorizing individuals regarded as disabled within the statutory definition of "disabled" under the ADA was articulated by the United States Supreme Court in *School Board of Nassau County v. Arline,* 480 U.S. 273 (1987), in the context of the Rehabilitation Act.

> By amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.

Id. at 284 (footnote omitted). Accordingly, as the regulations provide:

> [I]f an individual can show that an employer or other covered entity made an employment decision because of a perception of disability based on "myth, fear or stereotype," the individual will satisfy the "regarded as" part of the definition of disability. If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the

> employer is acting on the basis of "myth, fear or stereotype" can be drawn.

29 C.F.R. § 1630.2(*l*).

The plaintiff has presented no evidence that the defendant terminated her employment based on a "myth, fear or stereotype" surrounding her depression or perception thereof. Rather, the defendant contends, and the record reflects, that the plaintiff's employment was terminated since she did not possess the flexibility to accept nuclear related assignments.

The court recognizes the serious and potentially tragic consequences depression and other mental illnesses can present. However, the court also recognizes that depression, like many physical impairments, exists in degrees, as the plaintiff's case represents. This recognition is fostered by the regulations.

> The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of factors.

29 C.F.R. § 1630.2(j) (App.). To hold otherwise would effectually render depression a disability per se, and would be inconsistent with the analytical framework articulated in the ADA and corresponding regulations.

The plaintiff has failed to establish that she was "disabled" for purposes of the ADA. Accordingly, the defendant's motion is due to be granted and the claim dismissed.

2. The Rehabilition [sic] Act of 1973.

Title 29 U.S.C. § 794(d) provides that "[t]he standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under Title I of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12111 *et seq.*). . . . " Thus, as the plaintiff is not "disabled" within the meaning of the ADA, the plaintiff is not "disabled" within the meaning of the Rehabilition [sic] Act of 1973. Accordingly, it is unnecessary to determine whether the defendant is governed by the Rehabilitation Act as a "recipient" of federal financial assistance. This claim is due to be dismissed.

3. Title VII.

In brief, the plaintiff contends that the defendant discriminated against her on the basis of gender in two separate ways. First, she asserts that the defendant failed to transfer her to a vacant position for which she was qualified, and instead hired males to fill those positions. Second, plaintiff avers that she was terminated because of her inability to perform nuclear work while a male employee, who was also unable to perform nuclear duties due to stress, was not terminated. The plaintiff contends that these actions constitute intentional gender discrimination in violation of Title VII.

One who alleges disparate treatment on account of gender under Title VII must prove that the defendant acted with discriminatory purpose. *Nix v. WLCY Radio/Rahall Communications,* 738 F.2d 1181, 1184 (11th Cir. 1984). The plaintiff can create a rebuttable presumption of discriminatory intent by establishing a prima facie case. *Young v. General Foods Corp.,* 840 F.2d 825, 829 (11th Cir. 1988), *cert. denied,* 488 U.S. 1004 (1989). A prima facie case may be established by direct evidence, by circumstantial evidence using the *McDonnell Douglas* shifting inferences process, or by demonstrating a pattern of discrimination through statistics. *Earley v. Champion Intern. Corp.,* 907 F.2d 1077, 1081 (11th Cir. 1990).

Once the plaintiff has established a prima facie case, the defendant must articulate a legitimate, non-discriminatory rationale for the adverse employment action it took with regard to the plaintiff. *Young,* 840 F.2d at 828. The burden shifts back to the plaintiff to prove that the defendant's asserted reason is pretextual. *Id.*

> The inference of intentional discrimination raised by a plaintiff's prima facie case may be stronger or weaker, depending upon the facts of the particular case. *Grigsby v. Reynolds Metal Co.,* 821 F.2d 590, 595 (11th Cir. 1987). To a large extent, of course, the strength or weakness of the inference of discrimination created by the employee's prima facie case defines the nature of the employer's rebuttal. *See Meiri v. Dacon,* 759 F.2d 989, 997 (2d Cir. 1985). In some cases, the defendant's evidence of a legitimate non-discriminatory reason for its actions may be so

> strong as to rebut completely the inference raised by the plaintiff's prima facie case.

Earley, 907 F.2d at 1081.

The plaintiff does not create a factual issue by merely establishing a prima facie case. *Id.* Rather, to avoid summary judgment, if the defendant produces evidence of legitimate nondiscriminatory reasons for the employment action, "the plaintiff must then present concrete evidence in the form of specific facts which show that the defendant's proffered reason is mere pretext." *Id.* The evidence must be sufficient to allow a reasonable finder of fact to conclude that the defendant's articulated reasons for its decision are not believable. *Howard v. BP Oil Co.*, 32 F.3d 520, 526 (11th Cir. 1994). The plaintiff must do more than merely challenge the defendant's credibility through conclusory allegations and assertions. *Id. See also Earley*, 907 F.2d at 1081 ("Mere conclusory allegations and assertions will not suffice.").

The plaintiff first asserts that the defendant failed to transfer her to a vacant position for which she was qualified, and instead hired males into these positions. Specifically, plaintiff states that two designer positions and one Senior Design position existed within the Engineering Organization that were filled by males. Under the *McDonnell Douglas* framework, the plaintiff establishes a prima facie case by establishing that (1) she is a member of a statutorily protected group; (2) she was qualified for the position she did not receive; (3) she suffered an adverse effect with respect to her employment; and (4) she suffered from differential treatment. *Armstrong v. Flowers Hosp. Inc.*, 33 F.3d 1308, 1314 (11th Cir. 1994).

Assuming without deciding that the plaintiff has established a prima facie case, the defendant satisfied its burden of production by articulating a legitimate non-discriminatory reason for her discharge and presenting evidence in support thereof. The defendant contends that all of the engineers within the Engineering Organization are required to possess the flexibility to accept nuclear related projects. The record reflects that a majority of the work done by engineers within the Engineering Organization concerns nuclear related projects. Indeed, one of the defendant's largest clients is an entity that provides engineering and licensing support to the nuclear power plants owned by Alabama Power Company and Georgia Power Company. The defendant expressed requirement to the plaintiff as early as January 29, 1992, in response to the plaintiff's request for a non-nuclear related job.

Furthermore, the defendant has presented evidence that engineers are subject to transfers within the Engineering Organization according to the needs of the departments, including nuclear needs. The record contains evidence that an employee, male or female, who is not willing to accept a transfer will be terminated. The evidence shows that at least two men and one woman were terminated when they were unwilling to accept transfers.

On the other hand, the plaintiff has failed to offer any evidence sufficient to allow a reasonable finder of fact to conclude that the defendant's articulated reason is incredulous. She has not pointed to any inconsistent statements made by the defendant on this issue, *see Howard,* 32 F.3d at 526, nor suggested that the males who were hired did not possess nuclear flexibility. The plaintiff merely makes conclusory assertions that she was unaware of such requirements. As these conclusory assertions are insufficient to create a genuine issue of fact with respect to pretext, the defendant's motion for summary judgment is due to be granted.

The plaintiff also avers that she was terminated because of her inability to perform nuclear work while a male employee, who was also unable to perform nuclear duties due to stress, was not terminated. The only evidence offered in support of this assertion, consists of the plaintiff's deposition testimony that she heard from unnamed co-workers that a Mr. Loren Secrest was transferred from Plant Vogtle to a non-nuclear position at some time in the past as a result of his medical inability to work on nuclear related projects. The plaintiff cannot establish a prima facie case on unsubstantiated hearsay. Accordingly, plaintiff has failed to establish a prima facie case of gender discrimination, and the claim is due to be dismissed.

B. Claims Against the Individual Defendants.

The plaintiff may not bring the present action against the defendants Jeff Prince and Don Welliver in their individual capacities. In *Busby v. City of Orlando,* 931 F.2d 764 (11th Cir. 1991), the court concluded that individual capacity suits under Title VII are inappropriate.[4] The court noted that "[t]he relief granted under Title VII is against the *employer,* not individual employees whose actions would constitute a violation of the Act." *Id.* at 771 (emphasis in original). The court relied in part on the Title VII definition of "employer." 42 U.S.C. § 2000e(b) defines "employer" as

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[4] The ADA incorporates the enforcement provisions of Title VII.

> a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, and Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code [5 USCS § 2102], or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954 [Internal Revenue Code of 1986] except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [Mar. 24, 1972], persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

Similarly, the ADA, upon which plaintiff also relies, applies to "covered entit[ies]." "Covered entity" is defined to include "employer," and "employer" is defined as

> . . . a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for

> two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.
>
> . . . The term "employer" does not include –
>
> (I) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or
>
> (ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

42 U.S.C. § 12111(2) and (5). In light of the substantive identity of the two definitions, this court concludes that the rationale of the *Busby* court in the Title VII context applies equally to the ADA claim in the present case.

The plaintiff relies upon *Cross v. Alabama*, 1994 WL 424303 (11th Cir. 1994), to suggest that *Busby* has been overruled. In *Cross*, the plaintiff commenced an action under Title VII against "Michael Horsley, individually and as Associate Commissioner for the State Department of Mental Health & Mental Retardation," among others. In addressing Horsley's contention that he was not an "employer" for purposes of Title VII, the court noted that, as commissioner, he was an agent of the Department of Mental Health & Mental Retardation, "with actual authority to hire and fire employees of the Department." The court concluded: "Thus, Horsley, *as commissioner*, is an 'employer' for purposes of Title VII." *Cross*, 1994 WL at * 14 (emphasis added). The court did not hold that

Horsley, in his individual capacity, was an "employer" for Title VII purposes.

Furthermore, the Eleventh Circuit has recently reaffirmed the *Busby* rule which holds that individual supervisors may not be held liable under Title VII. *Smith v. Lomax,* 45 F.3d 402, 403, n. 4 (11th Cir. 1995). Neither are they liable under the ADA. All claims against Jeff Prince and Don Welliver are due to be dismissed.

A separate order in conformity with this opinion will be entered contemporaneously herewith.

Done, this 31st of March, 1995.

/s/ Edwin L. Nelson
EDWIN L. NELSON
UNITED STATES
DISTRICT JUDGE

Judgment

In accord with the Memorandum of Opinion entered contemporaneously herewith, it is hereby ORDERED, ADJUDGED, and DECREED:

1. The court explicitly finds there is no genuine issue as to any material fact;

2. The defendants' motion for summary judgment is GRANTED;

3. Costs are taxed against the plaintiff and in favor of the defendants.

Done, this 31st of March, 1995.

Edwin L. Nelson
United States District Judge

Sue PRITCHARD, Plaintiff-Appellant,

v.

SOUTHERN COMPANY SERVICES, Don Welliver, and Jeff Prince, Defendants-Appellees.

No. 95-6312.

United States Court of Appeals,
Eleventh Circuit.

Dec. 13, 1996.

Employee brought action against employer and individual officers, alleging violations of Americans with Disabilities Act (ADA), Rehabilitation Act, and Title VII. The United States District Court for the Northern District of Alabama, No. CV 94-N-475-S, Edwin L. Nelson, J., granted summary judgment for employer and officers, and employee appealed. The Court of Appeals, 92 F.3d 1130, affirmed in part and reversed in part. On petition for rehearing, the Court of Appeals held that employee's remedy for any discrimination she might have suffered on account of her alleged disability lay against her employer, not individual officers of her employer.

Affirmed in part and reversed in part.

Deborah A. Mattison, Birmingham, AL, for Plaintiff-Appellant.

John J. Coleman, III, Teresa G. Minor, Birmingham, AL, for Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

ON PETITION FOR REHEARING

(Opinion Aug. 28, 1996, 11th Cir., 1996, 92 F.3d 1130)

Before CARNES, Circuit Judge, and FAY and GIBSON*, Senior Circuit Judges.

ORDER:

Appellees' Petition for Rehearing is denied except as to a modification of the last paragraph of our opinion clarifying the status of the individual officers of Southern Company Services, Inc. Part IV Conclusion is amended to read:

IV. CONCLUSION

We conclude that the District Court erred when it granted SCSI summary judgment under the ADA and the Rehabilitation Act. We REVERSE that part of its decision. We AFFIRM summary judgment in favor of SCSI as to the Title VII claim, and we also affirm summary judgment in favor of Don Welliver and Jeff Prince as to all claims.[7]

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* Honorable John R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

[7] Pritchard's remedy for any discrimination she may have suffered on account of her alleged disability lies against her employer, not individual officers of her employer. *See Mason v. Stallings*, 82 F.3d 1007, 1009 (11th Cir.1996).

Supreme Court, U.S.
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No. 96-1442

In The

Supreme Court of the United States

◆

October Term, 1996

SOUTHERN COMPANY SERVICES, INC.,

Petitioner,

vs.

SUE PRITCHARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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33 pp

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This case is not one which should be reviewed by this Honorable Court. It does not present a unique application of the law nor does it conflict with prior precedent. Moreover, Petitioner, (hereinafter SCSI) in an attempt to capture the attention of this Court, raises several new issues not considered by the court below. Since the Eleventh Circuit's holding merely involves a common application of Rule 56 of the Federal Rules of Civil Procedure, wherein the court correctly held that Respondent (hereinafter Pritchard) had presented sufficient evidence to create a genuine issue of material fact on the existence of her disability, this Court should deny the Petition for Writ of Certiorari. As a result, this Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1254.

STATEMENT OF THE CASE

To the extent necessary to present a more accurate overview of the critical issues before this Court, Pritchard offers the following additions and/or corrections to SCSI's statement of the case.

As noted, Pritchard held several positions while employed by SCSI.[1] In May 1991, Pritchard transferred to the Quality Assurance Department ("QA") to work as an Engineer I. There, Pritchard was largely responsible for conducting audits on nuclear power generating plants to assure regulatory safety compliance. On each of the occasions that Pritchard transferred while at SCSI, Pritchard did so without formally executing any transfer and/or application request. R-3-61-1, p. 1; R-3-61-2, pp. 42, 45, 49, 51-52, 54-55, 60-61, 63-65, 106-107, 120-125.[2]

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[1] While working at SCSI, Plaintiff preformed her duties well and she was either transferred or promoted several times. R-3-61-1, p. 2; R-3-61-3; R-3-61-4, pp. 104, 108; R-3-61-5, p.121.

[2] This is significant because it demonstrates that SCSI has a practice of transferring employees without requiring the employee to execute any formal transfer request.

In 1990, Pritchard began to experience clinical depression. Pritchard's depression grew more severe during 1991 and 1992, and on May 1, 1992, she ultimately took a leave of absence on the advice of her treating psychiatrist, Dr. Neville. During her leave of absence, Pritchard was treated for major clinical depression and dysautonomia.[3] Until at least Pritchard's deposition in June 1994, she continued to experience the above medical conditions for which she took medication. Further, as will be explained below, from 1992 until her termination in June 1993, Pritchard's disability substantially limited her ability to communicate, concentrate, care for herself, and to function in a variety of other areas. R-3-61-1, p. 3; R-3-61-2, pp. 13, 96, 154-155, 186-188, 280-281; R-3-61-7; R-3-61-8.

Contrary to SCSI's assertion, there is no doubt that SCSI was well aware of Pritchard's disabilities. Carl Watts, manager of Employee Relations and Safety in SCSI's Human Resources Department knew that Pritchard had clinical depression which was significant enough to interfere with her ability to work. Additionally, both Prince, who was the Head of Human Resources, and Welliver, Manager of Quality Assurance and Research, were aware that the severity of Pritchard's depression interfered with her ability to work and both also perceived Pritchard as a person with a disability, as that term is defined by the ADA. This fact is significant because it was part of Watts' and Prince's job responsibilities to determine who the ADA protected, in order to assure that employees were reasonably accommodated and otherwise treated in a non-discriminatory manner. R-3-61-1, p. 4; R-3-61-2, pp. 177-180, 182-184; R-3-61-4, pp. 112, 123; R-3-61-5, pp. 101-102, 104; R-3-61-6, pp. 15, 42, 45-46, 51-55, 59-142.

By December 1992, Pritchard had improved sufficiently to be released to work by Dr. Neville, with certain limitations. Thus, at a

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[3] Dysautonomia is a disfunction of the automatic nervous system. This condition causes Pritchard to experience fatigue, loss of sleep, irregular heartbeat, being hot or cold irregularly, diarrhea, heartburn, upset stomach, and tingling of the hands and feet. R-3-61-2, pp. 181-182.

1992 Christmas party, Pritchard informed SCSI that she was willing and able to return to work, so long as her duties did not include the performance of work in the nuclear field. R-3-61-1, p. 4; R-3-61-2, pp. 194-195, 206; R-3-61-10.

Significantly, until her termination in June 1993, Pritchard continued to express her willingness and strong desire to return to work by way of a transfer to any vacant position for which she was qualified. However, SCSI continually refused to even attempt to accommodate Pritchard, despite the expansive definition of "accommodation" under the ADA. SCSI's response to Pritchard's continued requests for a transfer was to require Pritchard to remain on an unpaid disability leave of absence in the event Pritchard's condition improved enough to allow her to return to her former position in Quality Assurance. Further, from the time Pritchard was released to work in January 1993, until her termination in June 1993, every time SCSI solicited information about Pritchard's disability, it was for the purpose of maintaining Pritchard on the unpaid disability leave. R-3-61-2, pp. 206-07; R-3-61-5, pp. 149, 193-197; R-3-61-6, pp. 108-109.[4]

On January 29, 1993, Pritchard was officially released to return to work, effective February 1, 1993, with the aforementioned restriction by Dr. Neville. Dr. Neville explained that the nuclear field "seems to have stress that was very difficult for Pritchard to cope with. Stress in that job situation seems to have contributed to her depression and decompensation requiring time off work." After receiving the letter from Pritchard, SCSI continued to refuse to reinstate Pritchard, but retained her on unpaid disability leave of absence. If SCSI was confused about Neville's seemingly clear restriction, it took no steps to clarify his meaning until June 10,

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[4] The record is replete with specific instances where, in response to Pritchard's attempt to return to work, SCSI required Pritchard to remain on unpaid disability. For example, on or about January 14, 1993, Prince contacted Pritchard, not to transfer her to a vacant position, but to secure a medical release for the purpose of continuing Pritchard on a disability leave of absence. R-3-61-1, p. 4; R-3-61-5, pp. 135-137; R-3-61-12.

1993. Even then, SCSI failed to take the steps necessary to secure any further information. R-3-61-1, p. 6; R-3-61-2, p. 206; R-3-61-5, pp. 146-147; R-3-61-7; R-3-61-10.

On January 29, 1993, Pritchard again contacted Prince in an effort to return work. During the conversation, Pritchard expressly indicated her strong desire to transfer to **any vacant position for which she was qualified.** The January 29, 1993, conversation between Pritchard and Prince ultimately created one of the most hotly debated issues in the litigation. During the conversation, Prince suggested that Pritchard was free to "apply" for other positions which were posted on SCSI's "job hotline." Confused, Pritchard asked Prince why she should "apply" for positions listed on the "hotline", since she was already employed by SCSI and the hotline was designed solely for "new hires." Pritchard told Prince that, consistent with her previous experiences with SCSI, transfers regularly occurred within SCSI without employees formally "applying" for a position. She also stated her understanding that many vacancies were not even listed on the hotline.[5] Finally, she asked for more information on what was expected of her. In response to Pritchard's questions, Prince retracted his previous suggestion regarding the hotline by responding that Pritchard should not "worry about it at this time." Instead, Prince instructed Pritchard to simply provide Prince with the aforementioned requested medical information to continue her disability leave and stated further that he would communicate later with Pritchard regarding any future employment opportunities. R-3-61-1, pp. 5-6; R-3-61-2, pp. 218-222; R-3-61-6, p. 73; R-3-61-5, pp. 189-191; R-3-61-6, pp. 134-136.

On February 15, 1993, Prince contacted Pritchard and told her that since Dr. Neville had recommended against returning to nuclear work, SCSI had no positions available for Pritchard. According to Prince, all of the engineering jobs required the

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[5] Pritchard denies that her husband brought her home a listing of vacancies before her termination. R-3-61-1, p. 12.

"flexibility to accept nuclear assignments." Prince also told Pritchard that "management has approved to continue your DLOA (disability leave of absence) for 90 days to May 15." R-3-61-1, p. 7; R-3-61-2, pp. 25, 206-207, 226-227; R-3-61-15.

Pritchard vehemently denies that the so-called flexibility to accept non-nuclear assignment is an essential function for every engineering position. The Eleventh Circuit also stated that this issue would have to be resolved by a jury. SCSI is an extremely large and diverse corporation and a number of engineering positions exist which involve absolutely no and/or extremely limited nuclear work. This includes engineers who work with fossil fuel and hydroelectric generating plants, telecommunications, computing, environmental affairs, research, substations, transmission planning and design, materials procurement, and fuel procurement. Moreover, the engineering job description does not identify the so-called "flexibility to accept nuclear assignments" as a requirement. R-3-61-1, pp. 7-9; R-3-61-2, pp. 226-227; R-3-61-4, pp. 175, 178, 388-389; R-3-61-14; R-3-61-19.[6]

No one from SCSI contacted Pritchard during March or April 1993. In April 1993, Prince contacted Watts to inform him that Pritchard's 90-day unpaid disability leave of absence was about to expire. At this time, SCSI had failed, still to even attempt to transfer Pritchard. Prince then instructed Pritchard to have her physician execute a second statement of disability in order to continue to maintain Pritchard on unpaid disability leave. Accordingly, on April 4, 1993, Dr. Neville physician executed an "Attending Physician's Statement of Disability" which identified Pritchard as having major clinical depression, recurrent, with low energy and nervousness, requiring medication on a daily basis. R-3-61-1, p. 7-8; R-3-61-2, p. 226; R-3-61-6, p. 110.

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[6] For example, most of the work in Fossil/Hydro is non-nuclear. The engineers in Fossil/Hydro are not hired to perform nuclear work or for their expertise in the nuclear area. Finally, Prince could not identify any negative consequences of having an engineer in Fossil/Hydro who did not have the flexibility to perform nuclear work. These facts are important because they include the factors which must be considered when identifying the essential functions of any position. 29 C.F.R. § 1630.2(n). R-3-61-1, p. 7; R-3-61-4, pp. 197-199; R-3-61-5, pp. 162-164, 169-170, 176; R-3-61-6, p. 169.

During May 1993, Pritchard continued to contact SCSI to communicate her strong desire to transfer to any vacant position. SCSI responded by requesting a more certain statement of disability in order to retain Pritchard on unpaid disability leave. R-3-61-1, p. 8; R-3-61-2, pp. 230-236, 248; R-3-61-5, p. 225; R-3-61-6, p. 132; R-3-61-19; R-3-61-21.

On May 17, 1993, Pritchard wrote to SCSI and reiterated her urgent need for a transfer to a vacant position. She also, again, challenged SCSI's assertion that all engineering positions at SCSI require either nuclear assignments or the flexibility to accept nuclear assignments, listing several areas within SCSI where no nuclear work is done. R-3-61-2, p. 212; R-3-61-19.

On May 24, 1993, Mr. Thomas E. Sanford, from the Employee Benefits Department of SCSI, sent Pritchard a letter outlining the process for Pritchard to apply for long-term disability. SCSI sent this letter despite Pritchard's statements that she was ready willing and able to return to work. On May 25, 1993, Dr. Neville, wrote SCSI again, reiterating that Pritchard was able to return to work, so long as it was not in the nuclear field. R-3-61-1, p. 10; R-3-61-23; R-3-61-24.

On June 10, 1993, Pritchard wrote to Prince seeking an update on her employment status. In response, Welliver set up a meeting with Pritchard, to be held on June 18, 1993. At that meeting, Welliver informed Pritchard that SCSI had decided to terminate Pritchard because Pritchard did not have the flexibility to work in the nuclear area. At this time, SCSI had never even attempted to place Pritchard in any vacant position. R-3-61-1, pp. 10-11; R-3-61-2, pp. 237, 240, 244; R-3-61-6, p. 189; R-3-61-25; R-3-61-26, pp. 2-7.[7]

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[7] It is undisputed that several vacancies existed at SCSI between January

(Cont'd)

Pritchard filed litigation challenging SCSI's failure to accommodate her and her subsequent termination. At the close of discovery, SCSI moved for a summary judgment, arguing that Pritchard did not have a disability within the meaning of the ADA. In response, Pritchard presented substantial evidence demonstrating a genuine issue of material fact on this point. The evidence included deposition testimony, an affidavit, and three declarations which described the significant impact Pritchard's impairments had on her ability to, *inter alia*, communicate, concentrate, care for herself, and function after December 1992. Specifically, Pritchard's affidavit stated:

> During my leave, up until the time of my termination, my disabilities substantially limited my ability to function. My symptoms included profound fatigue, difficulty sleeping and communicating, experiencing suicidal thoughts, uncontrollable crying and being limited in my ability to perform my former job classification of nuclear related engineering. In fact, from April, 1992 until January, 1993, I was unable to perform any work. I continue to take medication for my conditions.

Moreover, in her deposition, Pritchard described the significant symptoms she experiences as a result of her dysautonomia. R-3-61-1, p. 3; R-3-61-2, pp. 181-182.

(Cont'd)
and June 1993, which Pritchard would have been qualified to fill. These include two Electrical Designer positions, a Senior Designer position, two Integrated Resource Planning Analyst positions, a Telecommunications Engineer, and an Engineer Analyst position. All of these positions perform little or no nuclear work. R-1-61-1, pp. 7-12; R-3-61-4, pp. 361-365, 375-376, 385-386, 410; R-3-61-5, pp. 195-196, 300-302; B-291, 304-305, 307; R-3-61-27 through R-3-61-38.

Likewise, Dr. Samuel Saxton, Pritchard's psychologist, supplied a Declaration which stated:

> Pritchard presented symptoms of major depression which substantially limited her ability to function and which consisted of marked fatigue, lack of energy, lack of interest, poor concentration, memory problems, suicidal thoughts, depressed affect and irritability. These symptoms, although somewhat alleviated by medication, continued until at least June, 1993.

Decl. of Saxton, p. 2 (emphasis added).[8] R-3-61-7, p. 2. The declaration further stated that Pritchard was diagnosed as having "major depression, recurrent, with suicidal thoughts, and that she had difficulty sleeping." It also is noted that Pritchard continued to be treated for her medical condition. Pritchard also presented the Declaration of her husband, James Pritchard, which affirmed the above evidence. Dr. Virginia Pascal, also supplied a Declaration relative to Ms. Pritchard's dysautonomia and its effect. Finally, Pritchard presented evidence that **on April 4, 1993,** Dr. Neville executed an "Attending Physician's Statement of Disability" identifying Pritchard as having "major depression, recurrent with low energy, nervousness and taking medication on a daily basis." R-3-61-7, p. 2; R-3-61-8; R-3-61-11; R-3-61-17.

The District Court, however, granted SCSI's motion for summary judgment, obviously either ignoring or discounting Pritchard's evidence. R-4-86, p. 2.

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[8] As SCSI is well aware, at the time Pritchard's submission in response to SCSI's motion for summary judgment was due, Dr. Neville was critically ill with cancer. Thus, Saxton, a fully licensed psychologist who was in private practice with Dr. Neville and who was already familiar with Pritchard, reviewed Pritchard's file and communicated with Dr. Neville in order to render his opinion regarding Pritchard's condition. R-3-61-7.

After reviewing the record, the Eleventh Circuit reversed the District Court's decision and found that Pritchard's evidence had raised a genuine issue of material fact regarding the existence of a disability. It remanded the case for further proceedings. SCSI filed a Petition For Rehearing and Suggestion of Hearing *En Banc*, which was denied. SCSI now mischaracterizes several of the court's holdings in an attempt to secure review by this Court.

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT'S OPINION REGARDING THE DEFINITION OF DISABILITY IS CONSISTENT WITH THE STATUTORY CONSTRUCTION OF THE AMERICANS WITH DISABILITIES ACT AS WELL AS HOLDING FROM OTHER CIRCUITS.

At the onset, it must be remembered that the court below merely ruled on the straightforward and relatively common issue of whether Pritchard had produced sufficient evidence that she was disabled in order to withstand a motion for summary judgement. However, SCSI's now attempts to overstate the court's ruling, alleging that the Eleventh Circuit made certain findings regarding Pritchard's evidence which, in fact, the Eleventh Circuit Court of Appeals never found, nor considered. In reality, the Eleventh Circuit Court of Appeals simply reviewed the evidence in the light most favorable to Pritchard, as it was required to do, and concluded that several issues of material fact remained. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Pritchard was "not required to prove her case" in order to prevail. *Harris v. H & W Contracting*, 102 F.3d 516, 521 (11th Cir. 1996). Since the court in *Pritchard* simply rendered an opinion on a routine and well established principle of law, no review is needed.

The Americans With Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA"), and the Rehabilitation Act of 1973 was enacted primarily to place persons with disabilities on equitable footing with persons without disabilities in a variety of settings, including in the critical area of employment. 42 U.S.C. § 12101, *et seq*., 29 C.F.R. § 1630.1, *et seq*. Congress was extremely concerned not only about employment discrimination but about "archaic attitudes" held by people insensitive to the plight of persons with disabilities. *School Board of Nassua County, Fla. v. Arline*, 480 U.S. 273, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987).[9]

As recognized by the Eleventh Circuit, in order to be protected by the aforementioned statutes, Pritchard must demonstrate that she is a person with a disability, as that term is defined by the ADA and Section 504.[10] 42 U.S.C. § 12012(2) states that "the term 'disability' means (a) a physical or mental impairment that substantially limits one or more of the major life activities of such an individual; (b) a record of such impairment; or (c) being regarded as having such an impairment."

A physical or mental impairment is broadly defined and includes virtually any disability, including depression or any mental or psychological disorder. 29 C.F.R. § 1630.2(H). 29 C.F.R. § 1630.2(A). Further, the issue of the existence of a disability must be determined "without regard to mitigating measures such as medicines. . . ." *Appendix to Part 1630 - Interpretive Guidance on Title I of the Americans With Disabilities Act* (hereinafter "Appendix"), 29 C.F.R. § 1630.2(H). *See also* S. Rep. No. 101-116, 101st Cong. 1st Sess. at p. 23; H. Judicial Rep. No. 101-485, Part 3, 101st Cong. 2nd Sess. at p. 28; *Canon v. Clark*, 883 F. Supp. 718 (S.D. Fla. 1995); *Lift v. Secretary of Transportation*, 5 NDLR 405 (D.D.C. 1994). When a person has more than one disability, the proper inquiry is whether the combination of the disabilities substantially limit any major life activity. EEOC Compliance Manual, § 915.002 at p. 35. Applying the regulations, the Eleventh Circuit and District Court correctly found that Pritchard's depression constituted a "mental impairment" under the ADA. R-86, p. 11. Pritchard also presented substantial evidence that her dysautonomia, too, is an impairment under the ADA. 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(h).

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[9] SCSI receives federal financial assistance in the form of funds from the Department of Energy.

[10] The two statutes define the term identically. *See* 29 U.S.C. § 706. Thus, further reference to the ADA will incorporate Section 504's definition.

"Major life activity" means the basic activities that the average person can perform with little or no difficulty. EEOC Compliance Manual § 902-2 at p. 14. The term is broadly defined and it can include performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 29 C.F.R. § 1630.2(I); *Best v. Shell Oil Co.*, 9 NDLR 171 (7th Cir. 1997). This list is not exhaustive and other activities can include sitting, standing, lifting, reaching, or having the ability to engage in normal social relations. *Doe v. District of Columbia*, 796 F. Supp. 559 (D.D.C. 1992); 29 C.F.R. § 1630.2(I), Appendix. *See Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993). Mental and emotional processes such as thinking, concentrating, and interacting with others, are other examples of major life activities. EEOC Compliance Manual § 902.3 at p. 15.

In this case, the District Court correctly found that functioning, sleeping, concentrating, and communicating were major life activities. The Eleventh Circuit, acknowledging the existence of such major life activities, found that, Pritchard also presented evidence that her ability to, *inter alia*, communicate, concentrate and sleep were significantly affected. The court also noted that Dr. Saxton had stated that Pritchard had marked fatigue, lack of energy and interest, poor concentration and communication, memory problems and suicidal thoughts.

Contrary to SCSI's mischaracterization, the Eleventh Circuit clearly stated that an impairment must be examined on a case-by-case basis and that Pritchard's depression must substantially limit a major life activity in order to be protected by the ADA. To determine whether a condition significantly restricts a major life activity, the proper analysis is whether the impairment significantly restricts the manner or duration which the individual may perform the activity, as compared with the average person. 29 C.F.R. § 1630.2(1). The regulations also indicate that it is important to examine "the nature and severity of the impairment, the duration or expected duration of the impairment and the long- term or permanent impact of the impairment." It is also important to look at the residual effects of an impairment. 29 C.F.R. § 1630.2(J), Appendix.

There can be no doubt that Pritchard presented evidence that the nature and severity of her disabilities extremely limited her overall functioning in a variety of areas, including her ability to care for herself. The evidence also demonstrated significant difficulties with Pritchard's mental and emotional process, and her concentration, and her communication with others. Especially when assessing the evidence in the manner most favorable to Pritchard, which was the standard imposed upon the Eleventh Circuit, there can be no question that Pritchard presented substantial evidence demonstrating that she had a multitude of symptoms which, especially without medication, severely limited her ability to perform a variety of major life activities. Among the most notable limitations was evidence indicating Pritchard had **profound** fatigue, **uncontrollable** crying and **suicidal ideation.** She also had a lack of interest, lack of energy, poor communication, and memory deficiencies. Pritchard and Dr. Saxton affirmatively explained how these conditions substantially limited Pritchard's ability to function. Moreover, given Pritchard's suicidal ideation, it is a reasonable inference that without medication, Pritchard might not be alive.

Further, the length of time Pritchard had major clinical depression and dysautonomia, from 1990 until at least her deposition in June 1994, demonstrates that Pritchard's impairments were of long-term duration, with corresponding impact. As of April 1993, Dr. Neville diagnosed Pritchard as having "major depression, recurrent, with suicidal thoughts" and he had prescribed medication to control its affects. Even with the medication, however, Pritchard's symptomology continued and, again, it included **marked** fatigue, lack of energy, lack of interest, poor concentration, memory problems, suicidal thoughts, depressed affect and irritability.[11] This is true despite the fact that Pritchard had already received extensive and long term treatment for these impairments. Thus, Pritchard's evidence was far more than a simple conclusionary statement, as Pritchard extensively described her limitations and supported them with medical evidence.

Further, the residual effects of Pritchard's condition demonstrates that she is disabled. Pritchard has needed to continue to rely on medication for several years and she is indefinitely restricted as to the type of work she can perform. Further, SCSI made the decision that Pritchard could not perform any work from January to June 1993, and based its termination on her condition. *See* EEOC Compliance Manual § 915.002 at p. 33, (which recognizes that a disability may have a long term impact on an individual by limiting her ability to perform one or more major life activities indefinitely.) Thus, the Eleventh Circuit's opinion that the issue of whether Pritchard was disabled was a question for the jury, is consistent with the plain language of the ADA.

Additionally, the Eleventh Circuit's decision is extremely consistent with opinions of other court's regarding the potential debilitating effect major clinical depression can have on an individual. More than one court has also noted the debilitating nature of major clinical depression. *In Lift v. Secretary of Transportation, supra*, the plaintiff, like Pritchard, had major depression of long-standing duration. Rejecting defendant's contention that the proper inquiry was whether medication controlled plaintiff's condition, the court characterized defendant as trivializing the symptoms of plaintiff's depression in light of its "universal" recognition as a "significant" impairment. 5 NDLR at p. 1308.

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[11] Nor does Pritchard's impairment need to be permanent. EEOC Compliance Manual, § 915.002 at pp. 29-30. It is enough if the impairment lasts several months, is indefinite or unknown. *See also Katz v. City Metal Co.*, 87 F.3d 26 (1st Cir. 1996)

Finally, and contrary to SCSI's argument, the fact that Pritchard was able to perform certain jobs which required communication and concentration skills, does not mean an absence of a factual issue on the existence of a disability. As the Eleventh Circuit Court of Appeals noted, an individual can be both limited in her ability to communicate and, especially with the help of medication, still be able work. The fact that Pritchard is limited in her ability to communicate does not mean that she *cannot* effectively communicate. For example, an individual with a profound hearing impairment is unquestionably substantially limited in his ability to communicate. Does that mean such individual is not qualified to perform in any position requiring the ability to communicate? Of course not! The entire purpose of the ADA is to assure employment opportunities for persons with such limitations, with or without reasonable accommodations. In fact, the ADA anticipates that employees who are significantly limited in their ability to perform certain job duties, are, nonetheless, protected by the Act.[12] *See Milton v. Bob Maddox Chrysler, Plymouth, Inc.*, 868 F. Supp. 320 (S.D. Ga. 1994), wherein the court rejected an employer's argument that a plaintiff with a cancerous tumor, was not "disabled" because he was both able to work and engage in the same activities he performed prior to developing the condition.

Several courts, including the Eleventh Circuit's decision in *Harris v. H & W Contracting, supra*, have reached decisions consistent with the court's decision in *Pritchard*. In *Harris*, the court found that a woman with Graves Disease who arguably had less severe symptoms then Pritchard, had raised sufficient issues of material fact to preclude summary judgment. Likewise, other courts have found summary judgment inappropriate where, as here, plaintiff has presented evidence of the existence of an impairment which substantially limits a major life activity. *See Braverman v. Penobscot Shoe Co.*, 859 F. Supp. 596 (D. Maine 1994) wherein the court found a material issue of fact regarding whether plaintiff's cancer substantially limited a major life activity. *See also Perez v. Philadelphia Housing Authority*, 677 F. Supp. 357 (E.D. Pa. 1987), wherein the court, based on the plaintiff's and her physicians' statements regarding her impairment, found that she was substantially limited in several major life activities; *Guice-Mills v. Derwinski*, 967 F.2d 794 (2d Cir. 1992); *Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983). At least one court has held that the issue of the existence of a disability is a "highly fact-sensitive, determination," *Dutton v. Johnson City Bd. of County Comm'rs*, 859 F. Supp. 498, 506 (D. Kan. 1994). *See also Runnebaum v. Nationsbank of Maryland, N.A.*, 8 NDLR 335 (4th Cir. 1996).

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[12] Even if these abilities constituted essential functions for certain positions, the District Court failed to consider any potential reasonable accommodations which would have allowed Pritchard to perform the positions.

In conclusion, SCSI attempts to raise an issue where there is none. At no time did the Eleventh Circuit Court of Appeals imply that Pritchard's limitations did not have to be substantial. Rather, the Eleventh Circuit's finding is simply that Pritchard had presented sufficient evidence to create a material issue of fact regarding whether she had a medical condition which significantly restricted at least one major life activity. Indeed, based upon the abundant evidence presented by Pritchard, the court's decision was entirely in keeping with the ADA and does not conflict with any other Circuits.

II. THERE IS NO SPLIT IN THE CIRCUITS REGARDING ANY OBJECTIVE EVIDENCE REQUIREMENT.

The court's decision is also entirely consistent with decisions by the other Circuits relative to the issue both of what constitutes a disability as well as the type of evidence necessary to create a factual issue. Quite simply, there is no "split" regarding the issue of the so-called "objective" evidence requirement. Finally, an analysis of the cases relied upon by SCSI does not support its argument.

The primary decision relied upon by SCSI is *Beasley v. Indiana Bell Telephone Co.*, 1996 U.S. App. LEXIS 4956 (7th Cir. 1996). Severely narrowing the issue before it, the Seventh Circuit held only that *Beasley* presented no evidence of what his symptoms entailed or why they significantly restricted any of his life activities. Further, and contrary to SCSI's assertion, *Beasley* did not require that objective evidence be present in each case. Rather, it found only that *Beasley* had submitted no evidence that his symptoms, even when acute, substantially limited any major life activity. However, the court also noted "when the merits of a complaint involving subjective issues such as credibility, state of mind and motivation—where the critical element lies within the control of the movement—summary judgment may be inappropriate." 1993 U.S. App. LEXIS 4956, *1. The court also indicated that it would have likely reached a different opinion if *Beasley*, like Pritchard, had presented evidence from those who were familiar with him and the symptoms he experienced when he became ill.[13]

Dutcher v. Ingall's Shipbuilding, 53 F.3d 723 (5th Cir. 1995) is equally distinguishable. Both Dutcher and her doctors readily acknowledged that her impairment caused no impact on her daily functioning. Further, "picking up little things from the floor" or "holding them up high" or "real tight" hardly equates with profound fatigue, lack of interest, uncontrollable crying, or suicidal ideation. *Dutcher*, does not even discuss any so-called "objective evidence" requirement. Finally, in *Roth v. Lutheran General Hospital*, 57 F.3d 1449 (7th Cir. 1995), the evidence from his doctors did not substantiate plaintiff's statement of his limitations. Again, Roth's doctors were unable to support Roth's limitations without relying on Roth's assertions and notably, the court found that Roth was not creditable.[14]

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[13] Further, notably absent from SCSI's discussion of the law in the Seventh Circuit, is *Best v. Shell Oil Co., supra*. In *Best*, the court found a material issue of fact where a truck driver with an injured knee was limited in the major life activity of working. Indeed, the Seventh Circuit decision in *Shell* is extremely consistent with *Pritchard*, especially since it seems that Best's impairment was less limiting than Pritchard's.

[14] SCSI also fails to mention *Homeyer v. Stanley Tulchin Associates, Inc.*, (Cont'd)

Further, even if so-called "objective evidence" was required, Pritchard's evidence, which included statements from Dr. Neville and Dr. Saxton, as well as her husband, regarding the existence and effect of her disability on her everyday life, constituted sufficient evidence.

In conclusion, there is no requirement that Pritchard present any so-called "objective" evidence so long as she presented sufficient evidence of the existence of a condition which substantially limits at least one major life activity. SCSI has attempted to create a conflict where there is none, and thus, there is no need to belabor the point further.

III. THE ELEVENTH CIRCUIT DID NOT HOLD THAT THE MERE USE OF MITIGATING MEASURES AUTOMATICALLY PROVES THE PRESENCE OF A DISABILITY.

Astonishingly, SCSI accuses the court of holding that any individual with a medical condition which utilizes a mitigating measure is **automatically** deemed eligible under the ADA. Even a cursory review of the Eleventh Circuit's decision indicates that it never reached this conclusion. Consequently, there is absolutely no reason for this Court to exercise jurisdiction on this issue, as SCSI has seriously misstated the court's holding.

As explained previously, the general rule under the ADA is that the existence of a disability is to be examined without the use of mitigating measures such as medication. *Harris v. H & W Contracting*, 102 F.3d 516 (11th Cir. 1996). 29 C.F.R. § 1630.2(J), Appendix. The existence of this rule is academic, however, because

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(Cont'd)
8 NDLR 264 (7th Cir. 1996) wherein an employee who was sensitive to environmental tobacco smoke pled sufficient facts to demonstrate a substantial limitation in an activity other than working.

even with medication Pritchard presented substantial evidence that she was significantly limited as described above.

In reaching its opinion, the court noted that Pritchard experienced the above-described symptoms and resulting limitations, for which Pritchard was still taking medication in June 1994. In acknowledging Pritchard's evidence, the Eleventh Circuit **never held** that the existence of Pritchard's medication, **automatically** meant that Pritchard was disabled. Rather, the court simply held that even with the use of medication, Pritchard had presented sufficient evidence to demonstrate an issue of material fact.[15] That was the extent of the court's holding, and despite SCSI's mischaracterization of its ruling, there is simply no need for the court to exercise jurisdiction regarding this issue.[16]

IV. THE ELEVENTH CIRCUIT'S FINDING THAT SUFFICIENT EVIDENCE EXISTED TO DEMONSTRATE A GENUINE ISSUE OF MATERIAL FACT REGARDING SCSI'S PERCEPTION OF PRITCHARD AS DISABLED IS CONSISTENT WITH THE ADA AND THE OPINIONS OF OTHER CIRCUITS.

After reviewing the record, which included evidence that SCSI continually refused to accommodate Pritchard by allowing her to return to work, the Eleventh Circuit held that Pritchard had presented sufficient evidence that SCSI perceived Pritchard as possessing a disability and/or that she had a record of such, to create a genuine issue of material fact on these points. Again, SCSI attempts to confuse the record by overstating the court's ruling and neglecting to mention the standard imposed upon the court by Fed. R. Civ. P. 56.

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[15] Of course, it is a reasonable inference that without medication, Pritchard's symptoms would be worse.

[16] SCSI's reliance on *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993) is misplaced. In *Chandler*, unlike here, plaintiff testified that as a result of taking insulin that he experienced no limitation in a major life activity. Moreover, the Fifth Circuit in *Chandler*, specifically declined to determine whether a person with a disability who was dependant on insulin was *"per se"* disabled under the ADA. 2 F.3d at 1391. *Roth v. Lutheran General Hospital*, 57 F.3d 1446 (7th Cir. 1995) merely restates the general rule regarding mitigating measures with which Pritchard has no quarrel.

In reaching its conclusion, the Eleventh Circuit's opinion is entirely consistent with the ADA's statutory language, its legislative history and the decisions of other Circuits. Contrary to SCSI's characterization of the court's opinion, the Eleventh Circuit never held that "leave alone" automatically establishes a perception of a disability.

In addition to protecting persons who actually have a disability, the ADA also protects persons with a record of an impairment or those who are perceived as impaired. 42 U.S.C. § 12102(2).[17] *School Board of Nassau County, Fla. v. Arline, supra.* Indeed, Congress intended that discrimination would include an employer's decision to deny an employee a particular job based on the fact that the employer regarded the employee as having a disability. H.R. Rep. No. 101-485, Part 3, 101st Cong., 2nd Sess. 30 (1990). It is not necessary for an employee to demonstrate that she unsuccessfully sought a myriad of jobs. According to both the ADA's legislative history, and the EEOC's Interpretive Guidance, the "regarded as" test will be satisfied if, "an employer makes an employment decision based on a myth, fear, or stereotype." If an employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of "myth, fear or sterotype" can be drawn. 29 C.F.R. § 1630(L), Appendix. *See also* Tucker and Goldstein, *Legal Rights of Persons With*

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[17] Having a record of a disability includes having a history of such. 29 C.F.R. § 1630.2(K). Persons are "regarded as having an impairment if they are treated . . . as if they were handicapped — regardless of their actual condition." *Harris v. Thigpen*, 941 F.2d 1495, 1524 (11th Cir. 1991). Congress acknowledges that some impairments are disabling due to the attitude of others. *Muller v. Hotsy Corp.*, 917 F. Supp. 1389 (N.D. Iowa 1996).

Disabilities: An Analysis of Federal Law, L.R.P. Publications, 1993. Further, if an employer's rationale, as is true here, tends to demonstrate the employer's belief that an employee is unable to perform a wide range of positions, then the employee is entitled to the ADA's protection.[18] The legislative history also states that an employee does not have to prove that an employer's belief is wrong. EEOC Compliance Manual § 915.002 at p. 44.

The importance of recognizing these additional categories of disabilities was underscored in *School Board of Nassau County, Fla. v. Arline, supra*, wherein this Court held that these categories served as important public policy considerations as the perception of others can be as stigmatizing as an actual impairment. Significantly, this Court also found that an individual who experienced a hospitalization for tuberculosis had a record of an impairment. Consequently, the Eleventh Circuit's holding is consistent with *Arline*.

Pritchard was first granted leave at her own request in April 1992. There is no dispute that she was unable to perform in any position until her doctor released her to return to work, with restrictions, in January 1993. However, SCSI ignores the fact that **it was SCSI who required Pritchard to remain on unpaid disability leave for approximately five (5) additional months after her release, and that it terminated her,** despite Pritchard's continued request to transfer to a position for which she was qualified. Although, SCSI tries to characterize the entire leave period as being at the request of Pritchard, the records clearly states that from January 1993 until the present, Pritchard did not want to be on unpaid leave; **she wanted to work.**

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[18] The correct analysis regarding this aspect is in the attitudes of others. *See Muller v. Hotsy Corp., supra*, where the court found an issue of fact based on, *inter alia*, the employer's testimony that it regarded the employee as disabled and that it refused to allow *Muller* to perform in a variety of positions. Likewise, in *Cook v. Rhode Island Dept. of MHRH*, 10 F.3d 17 (1st Cir. 1993) an employee was covered by the ADA not because she actually had a disability which substantially limited a major life activity, but because the employer believed that the employee's obesity prevented her from performing certain job duties. *See also McGinnis v. Wonder Chemical Co.*, 7 NDLR 290 (E.D. Pa. 1995).

SCSI attempts to characterize the Eleventh Circuit's opinion as holding that leave **automatically** demonstrates that an employer perceives a disability, even if an employer is simply "acquiescing" to an employee's request. Not only is this mischaracterization contrary to a plain reading of the court's decision, it also ignores the record. Rather, after reviewing the record and consistent with Fed. R. Civ. P. 56(f), the court held only that the above evidence raised a genuine issue of material fact on SCSI's perception of Pritchard as disabled. No where in its decision did it find Pritchard's leave automatically established the existence of a disability, and SCSI's description of the Eleventh Circuit's holding can be read only as an attempt to create an issue for review where none exists.

Moreover, Pritchard is not arguing that her perception of herself is controlling, nor can the court's decision be read in this manner. Again, SCSI ignores the extensive evidence that it was **the employer who refused to allow Pritchard to transfer to any position, due to SCSI's perception that Pritchard's restrictions prevented her from performing the essential functions of any job within the company.** Further, Prince and Welliver expressly testified that Pritchard's disabilities interfered with Pritchard's ability to work, and that she was "covered" by the ADA.

SCSI's reliance on *Gray v. Ameritech Corp.*, 937 F. Supp. 762 (N.D. Ill. 1996) to create a split in the Circuits, is astonishing, first as it is only a District Court decision, and second, as the court in *Gray* ultimately found sufficient evidence to create a factual issue on Gray's employer's perception. Further, its holding is distinguishable from *Pritchard*, to the extent that it was the employee who requested the entire period of disability leave and her employer accommodated her by allowing her to return to work.

Unlike here, there was no evidence that Gray's employer believed Gray to be so disabled to prevent her from working in any position.[19]

Moreover, SCSI cannot realistically argue that SCSI thought only that Pritchard could not do one specific job. Indeed, SCSI terminated Pritchard because it perceived that her restrictions prevented her from performing the duties of any position, due to SCSI's insistence that all engineers have the ability to accept such assignments. As stated in the EEOC Compliance Manual, an employer's "actions may speak louder than words." EEOC Compliance Manual § 915.002 at p. 46.

Additionally, Pritchard obviously had a record of major clinical depression and she also, has a history of the condition, having been so medically diagnosed, and having received continuous treatment for depression until the time of her termination. *See* EEOC Enforcement Guidance.

SCSI's reliance on *Byrne v. Board of Education School of West Allis-West Milwaukee*, 979 F.2d 560 (7th Cir. 1992) is interesting, as its holding, too, tends to support Pritchard's position. Although Byrne failed to convince a jury she suffered discrimination, the court's final holding was that plaintiff had presented sufficient evidence that she had: (1) a disability; (2) a record of such; and (3) was so perceived, to enable those issue to be presented to a jury. During plaintiff's post-trial motion for directed verdict, the court reviewed all evidence in the light most favorable to the nonmovant, and stated that it would reverse only if no genuine issue of material fact existed and plaintiff was entitled to judgment. Of course, this is not the standard employed with *Pritchard*, where Pritchard argued that her evidence, when viewed most favorably to her, created an issue of fact.[20]

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[19] Likewise, Pritchard has no quarrel with SCSI's assertion that the definition of disability varies under different statutes or that some employees who have taken leave may not be disabled. Such does not undercut Pritchard's assertions, however, that the totality of the record demonstrates sufficient evidence that SCSI perceived her as disabled to avoid summary judgment.

Further, in arguing that Pritchard conflicts with the Seventh Circuit, SCSI again neglects to mention *Best v. Shell Oil Co., supra*, wherein the Seventh Circuit found an issue as to Shell's perception when Shell placed Best on disability leave and would not let him work. The holding in *Best*, thus, defeats SCSI's argument that there is a split in the Circuits.

Contrary to SCSI's assertion, the Eleventh Circuit's decision is also consistent with other courts which have denied summary judgment when, as here, a factual issue exists regarding whether an employer perceived an employee to have a disability. This is especially true where an employer's perception has caused it to limit an employee's job duties. *See McGinnis v. Wonder Chemical Co.*, 1995 U.S. Dist. LEXIS 18909 (E.D. Pa. 1995) (The court found an issue of fact existed wherein an employer refused to allow an employee who had been out on leave to return to work with restrictions). *See also EEOC v. Joslyn Manufacturing Co.*, 8 NDLR 199 (E.D. Ill. 1996) (The court found that an issue of material fact existed when an employer restricted an employee with carpal tunnel syndrome from performing in a number of positions. The test to determine perception is highly individualized.); *Stradley v. LaFourche Communications, Inc.*, 869 F. Supp. 442 (E.D. La. 1994) (The court found summary judgment inappropriate where sufficient evidence existed that the employer accepted an employee's doctor's diagnosis of depression and perceived plaintiff as limited in her ability to work); *Sigurdson v. Carl Bolander & Sons*, 511 N.W. 2d

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[20] Other cases relied upon by SCSI are also not on point. In *Stewart v. County of Brown*, AD cases BNA 1018 (7th Cir. 1996) the reason plaintiff was transferred was due to performance problems and plaintiff failed to offer any evidence of pretext. Moreover, the employer allowed plaintiff to return to work after being cleared by the doctors. Finally, Stewart, himself, agreed with the lack of evidence relating to perception and acknowledged that the dispute between he and his employer was a personality conflict. *Kelly v. Drexel University*, 94 F.3d 102 (3rd Cir. 1996) is also not controlling as plaintiff's only evidence of a disability was that he had a visible limp.

482 (Minn. Ct. App. 1994) (sufficient evidence existed to demonstrated that Sigurdson was perceived by his employer as being disabled when his employer denied him a job because of his diabetes); *Zambelli v. Historic Landmarks, Inc.*, 6 NDLR 194 (E.D. Pa. 1995) (the court denied summary judgment wherein plaintiff presented "a chain of circumstantial evidence" that her employer believed she had a disability); *Runnebaum v. Nationsbank of Maryland, N.A., supra* (an employer's knowledge that Runnebaum who was asymptomatic, was HIV positive, and was taking medication to control the fatal condition, was sufficient evidence to support an inference of perceived disability); *Roe v. District of Columbia*, 842 F. Supp. 563, 568 (D.D.C. 1993) (the court found that an employer who restricted a firefighter from performing specific duties as a result of his HIV status was "regarded as" having a handicap. Defendant's argument that he did not regard plaintiff as having an impairment was "difficult to understand and impossible to accept"); *Overturf v. Penn Ventilater Co., Inc.*, 8 NDLR 196 (E.D. Pa. 1996) (wherein the court found an issue of fact based on an employer's statements to plaintiff about her health.)

In conclusion, this Court should not exercise jurisdiction over SCSI's petition, as no valid reason exists for doing so. SCSI has mischaracterized the Eleventh Circuit's ruling in an attempt to create non-existent issues in an "last ditch" effort to appeal. The reality is that the Eleventh Circuit's decision is consistent with the case law in other Circuits and the plain language of the ADA.

V. THE ELEVENTH CIRCUIT PROPERLY REMANDED PRITCHARD AS NO ALTERNATIVE GROUNDS EXISTED FOR AFFIRMING SUMMARY JUDGMENT.

The Eleventh Circuit properly remanded *Pritchard* as no alternative grounds existed for affirming summary judgment. Indeed, Pritchard presented significant evidence that she was qualified to perform the essential functions of several positions to which she could have transferred. 42 U.S.C. § 12111(8). Pritchard also presented substantial evidence that SCSI failed to accommodate her by refusing to transfer her to any number of vacant positions to which she was qualified, and instead terminating her based on her disability. The Eleventh Circuit correctly stated that the controversy regarding whether all engineers must have the flexibility to accept nuclear work would have to be resolved by a jury. (*See* footnote 1.) Further, the court stated that a failure to provide a reasonable accommodation by way of a transfer can constitute discrimination. 42 U.S.C. § 12112. (*See* footnote 5.) At the very least, several genuine issues of material fact exist on these points, making remand appropriate.

CONCLUSION

Based on the foregoing, Respondent Pritchard respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari and remand the case for trial.

Respectfully submitted,

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